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Evidence: 1996-1997 Survey of New York Law

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EVIDENCE

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INTRODUCTION

Sometimes what did not happen during a given period can be as important as what did occur. For yet another year, New York failed to adopt a Code of Evidence.[1] Our state remains for now and, unfortunately, for the foreseeable future, one of the very few without the benefit of the kind of comprehensive, nicely packaged, reasonably clear and easily accessible body of evidence rules that now exist in thirty-eight other American jurisdictions.[2] Failure to enact a code after repeated past attempts has two serious consequences. First, there is the accessibility problem. It means that many complex and important principles of evidence cannot be found in one place—a research handicap for lawyers, judges and evidence scholars.[3] Secondly, there is the problem of uncertainty. There are fundamental evidence questions, easily answered in other jurisdictions, which, in New York, are unresolved and will apparently remain so until addressed by the Court of Appeals or the Legislature.[4] Part of the uncertainty results from lack of uniformity

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1. The unsuccessful codification effort in New York began in 1976 and has produced versions of proposed Codes in 1980, 1982, and 1991-92. *See* MICHAEL M. MARTIN, DANIEL J. CAPRA, & FAUST F. ROSSI, NEW YORK EVIDENCE HANDBOOK § 1.2.2 (Aspen Law & Business 1997). For a history of the failed effort, see Barbara C. Salken, *To Codify or Not To Codify—That is the Question, A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992).

2. The Federal Rules of Evidence provided the blueprint for most state codes. By 1994, 35 states had adopted codes based on the federal model: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Kentucky, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Washington, and Wyoming. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE & PRACTICE § 1.2, at 4 n.2 (1995).

Since 1994, Indiana and Maryland have also adopted codes based on the federal model. *See* IND. CODE ANN. tit. 34, RULES OF EVIDENCE, art. IX, §§ 101-1101 (West 1997); MD. REGS. CODE tit. 5, §§ 5-101 to 5-1008 (1994).

In addition, California, Kansas, Puerto Rico and several other states have codes that predated the enactment of the Federal Rules.

A detailed description of the benefits of codification is given in Faust F. Rossi, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*, 28 LOY. L.A. L. REV. 1271 (1995).

3. Since there are no rules of evidence, answers to difficult evidence questions usually require a search through a rag bag of miscellaneous statutes and decisions. Thus, for example, the definition of hearsay and some of the exceptions are judge made. Other exceptions may be found scattered throughout the Civil Practice Law and Rules or the Criminal Procedure Law. There are special statutes for child witnesses, statements of prior identification, witness competency and many other evidence topics.

4. We deal here with fundamentals, not esoteric matters. For example, can the prior inconsistent statement of a witness be admitted for its truth in a civil case or is it admissible only to impeach? In New York, the answer is unclear. *Compare In re* Grace "VV", 206

among the departments. Part results from old decisions announcing principles that are likely obsolete but have never been expressly overruled.

These problems have been somewhat mitigated in the last two years by the publication of no less than three new texts which seek to synthesize and clarify the New York law of evidence.[5] We seek to do our part with this *Survey* of significant state and federal developments in 1996 and 1997.[6] Most of the important decisions fall in the areas of hearsay, experts, relevance, privileges, and witnesses, and these topics, therefore, dominate our discussion.

I. HEARSAY

A. A Judicially Created Residual Exception

The Federal Rules of Evidence provide for a catch-all exception that permits reliable hearsay statements to be admitted even though the statements do not qualify under any of the established categorical exceptions to the rule against hearsay.[7] New York has no such express re-

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A.D.2d 608, 609, 614 N.Y.S.2d 582, 584 (3d Dep't 1994), *and* Campbell v. City of Elmira, 198 A.D.2d 736, 738, 604 N.Y.S.2d 609, 611 (3d Dep't 1993) (the statements may be admitted for their truth), *with* Noskewicz v. City of New York, 155 A.D.2d 646, 647, 548 N.Y.S.2d 237, 238 (2d Dep't 1989) (prior inconsistent statements are admitted "for the sole purpose of impeaching his credibility").

Consider another significant issue that arises frequently in personal injury litigation. Is a declarant's statement of present pain or existing physical condition admissible as an exception to the rule against hearsay? Two old decisions of the Court of Appeals sharply limit admissibility. *See* Roche v. Brooklyn City & Newtown R.R. Co., 105 N.Y. 294, 298, 11 N.E. 630, 631 (1887) (admissible only if the expressions are involuntary groans or screams; not if narrative descriptions); Davidson v. Cornell, 132 N.Y. 228, 238, 50 N.E. 573, 576 (1892) (admissible only if the statement is made to a treating physician; not if made to a lay person or a physician retained in anticipation of litigation). Are these cases and their peculiar limitations still good law? It seems unlikely since narrative expressions of existing conditions are present sense impressions which the Court of Appeals recognized as a hearsay exception in *People v. Brown*, 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 (1993). Thus, one cannot be sure.

5. The most recent publication is MICHAEL M. MARTIN, DANIEL J. CAPRA, & FAUST F. ROSSI, *supra* note 1. In 1996 and 1995, two other treatises were published. ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS (West Pub. Co. 1996); RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE (11th ed. 1995).

6. Last year's *Survey* issue did not contain an evidence section. Therefore, this *Survey* reports on the most significant decisions for the last two years from October 1995 through October 1997.

7. These residual exceptions were contained in Federal Rules of Evidence 803(24) and 804(b)(5). Effective December 1, 1997, these exceptions have been combined in Federal Rule of Evidence 807.

sidual exception. Over the years, however, the Court of Appeals has been willing, in limited circumstances, to admit trustworthy hearsay even though it fails to fit one of the standard exceptions.[8] This occasional recognition of a residual exception has been confined to civil cases.[9] The Court of Appeals has expressed reluctance to recognize such an exception when the hearsay is offered against the accused in a criminal case.[10] Yet, what if it is the accused who offers reliable hearsay against the prosecution? In such a case, the situation is different. There can be no argument that the confrontation clauses of the federal or state constitution are being violated since it is the defendant who offers the hearsay. On the other hand, some courts recognize that

> the exclusion of exculpatory hearsay statements may result in the denial of defendant's right to a fair trial in violation of due process, where the statement was critical to the defendant's defense and bore substantial assurances of trustworthiness, albeit it was not admissible upon the basis of any exception by the State's rules of evidence.[11]

The Court of Appeals has now accepted this distinction.[12] In *People v. Robinson*, one of the year's most significant decisions, the Court held that the accused's constitutional right to due process required the admission of hearsay evidence consisting of the grand jury testimony of an unavailable witness.[13] The defendant was convicted of sexual abuse for allegedly having sex with the complainant without her consent.[14] At trial, the defendant claimed that the act was consensual and that it occurred in the presence of his fiancee.[15] The defendant's fiancee, in her testimony before the grand jury, corroborated defendant's version of the event.[16] At the time of trial, the former fiancee had left the jurisdiction

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8. *See* Letendre v. Hartford Accident & Indem. Co., 21 N.Y.2d 518, 524, 236 N.E.2d 467, 470, 289 N.Y.S.2d 183, 188 (1968).

9. *See id.* at 524, 236 N.E.2d at 470, 289 N.Y.S.2d at 188.

10. *See id.*, 236 N.E.2d at 470, 289 N.Y.S.2d at 188.

11. People v. Nieves, 67 N.Y.2d 125, 131, 492 N.E.2d 109, 112, 501 N.Y.S.2d 1, 4 (1986) ("We are not prepared at this time to abandon the well-established reliance on specific categories of hearsay exceptions in favor of an amorphous reliability test particularly in criminal cases where to do so could raise confrontation clause problems."); *see also* People v. Concepcion, 228 A.D.2d 204, 644 N.Y.S.2d 498 (1st Dep't 1996) (error to admit unavailable victim's grand jury testimony against the accused).

12. *See* People v. Robinson, 89 N.Y.2d 648, 679 N.E.2d 1055, 657 N.Y.S.2d 575 (1997).

13. *Id.* at 650, 679 N.E.2d at 1056, 657 N.Y.S.2d at 576.

14. *Id.*, 679 N.E.2d at 1056, 657 N.Y.S.2d at 576.

15. *Id.*, 679 N.E.2d at 1056, 657 N.Y.S.2d at 576.

16. *Id.*, 679 N.E.2d at 1057, 657 N.Y.S.2d at 577.

and defendant's effort to secure her presence was unavailing.[17] The trial court rejected the defendant's offer of her grand jury testimony as inadmissible hearsay.[18] The grand jury testimony could not qualify under New York's statutory former testimony exception.[19] Nevertheless, the Court of Appeals held that the accused's constitutional due process right to present witnesses in his own defense mandated admission of the prior hearsay testimony.[20] The Court found that its three requirements for admissibility were met.[21] First, the hearsay evidence was critical for the defendant.[22] According to the Court, "[a]s the only other person with firsthand knowledge of the alleged events of that night, it is clear that defendant's then fiancee was in a position to offer testimony that would have been not only relevant and material but also vital to the defense."[23] Second, the witness who made the prior statement is no longer available.[24] Finally, and most important, the prior testimony was also reliable because the prosecution in the grand jury "exercised its full and fair opportunity to examine the witness it chose to call."[25]

B. Forfeiture of Objection by Wrongdoing

The Federal Rules of Evidence were amended, effective December 1, 1997, to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence procured the unavailability of the declarant as a witness at trial.[26] Two years ago, in *People v. Geraci*, the New York Court of Appeals also recognized an exception to a defendant's constitutional right of confrontation as well as to the rule against hearsay upon a showing that a witness had been rendered unavailable to testify in court through the misconduct of the defendant personally, or of others acting with defendant's knowing acquiescence.[27] The effect in this situation is to admit relevant hearsay which

17. *Id.* at 651, 679 N.E.2d at 1057, 657 N.Y.S.2d at 577.

18. *Id.*, 679 N.E.2d at 1057, 657 N.Y.S.2d at 577.

19. *Id.*, 679 N.E.2d at 1057, 657 N.Y.S.2d at 577; N.Y. CRIM. PROC. LAW § 670.10 (McKinney 1987).

20. *Robinson*, 89 N.Y.2d at 650, 679 N.E.2d at 1056, 657 N.Y.S.2d at 576.

21. *Id.* at 654, 679 N.E.2d at 1059, 657 N.Y.S.2d at 579.

22. *Id.*, 679 N.E.2d at 1059, 657 N.Y.S.2d at 579.

23. *Id.*, 679 N.E.2d at 1059, 657 N.Y.S.2d at 579.

24. *Id.*, 679 N.E.2d at 1059, 657 N.Y.S.2d at 579.

25. *Id.* at 656, 679 N.E.2d at 1060, 657 N.Y.S.2d at 580.

26. FED. R. EVID. 804(b)(6) (codifies existing federal law); *see* United States v. Mastrangolo, 693 F.2d 269 (2d Cir. 1982).

27. 85 N.Y.2d 359, 366, 649 N.E.2d 817, 821, 625 N.Y.S.2d 469, 473 (1995).

would otherwise be inadmissible.[28] The Court explained that this exception was not based upon the inherent reliability of this class of hearsay.[29] Rather, the exception is founded upon a rule of necessity to preserve the integrity of the adversary process by not allowing the party to profit from its wrongdoing in procuring witness unavailability and in order to reduce the incentive to tamper with witnesses.[30] The Court also held that the misconduct which triggers the exception had to be proved by clear and convincing evidence developed at a fact-based hearing.[31] In this regard, *Geraci* differs from the federal standard which imposes only a preponderance of the evidence test to establish the defendant's wrongdoing.[32]

A question arises in regard to this doctrine. If a defendant is charged with murder, could the victim's hearsay statements be admissible against the accused on the theory that the defendant procured the victim's unavailability as a witness? Is the intent to obstruct justice by witness tampering required, or would any misconduct which results in unavailability suffice? The Court of Appeals answered these questions this year in *People v. Maher* when it limited *Geraci* to after-the-event misconduct which is specifically intended to prevent trial testimony.[33] In *Maher*, the defendant was convicted of intentional murder.[34] The defendant admitted to the killing but claimed he was unable to form the requisite criminal intent by reason of his emotional and mental disturbance.[35] The trial court admitted hearsay statements made by the victim some weeks before her death about the defendant's threatening behavior.[36] The only ground for avoiding the obvious hearsay objection was reliance upon the *Geraci* principle.[37] There was no evidence that the defendant's acts against the victim were motivated by a desire to prevent her from testifying against him in court.[38] Although finding the error harmless, the Court held that admitting the victim's hearsay

28. *Id.* at 366, 649 N.E.2d at 821, 625 N.Y.S.2d at 473.

29. *Id.*, 649 N.E.2d at 821, 625 N.Y.S.2d at 473.

30. *Id.*, 649 N.E.2d at 821, 625 N.Y.S.2d at 473.

31. *Id.*, 649 N.E.2d at 821, 625 N.Y.S.2d at 473.

32. The Advisory Committee Note which accompanies Federal Rule of Evidence 804(b)(6) advises that "the usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior that new Rule 804(b)(6) seeks to discourage." FED. EVID. R. 804(b)(6) advisory committee's note.

33. 89 N.Y.2d 456, 677 N.E.2d 728, 654 N.Y.S.2d 1004 (1997).

34. *Id.* at 459, 677 N.E.2d at 729, 654 N.Y.S.2d 1005.

35. *Id.* at 461, 677 N.E.2d at 730, 654 N.Y.S.2d 1006.

36. *Id.* at 460, 677 N.E.2d at 730, 654 N.Y.S.2d 1006.

37. *Id.*, 677 N.E.2d at 730, 654 N.Y.S.2d at 1006.

38. *Id.*, 677 N.E.2d at 730, 654 N.Y.S.2d at 1006.

statements was an unwarranted expansion of *People v. Geraci*, in effect converting a narrow departure from the hearsay rule into a categorical authority for the admissibility of victims' statements in all homicide cases.[39] The Court went on to explain that application of the *Geraci* rule in this case "not only would swallow up the narrowly drawn traditional dying declaration hearsay exception, but would also require the trial court in a hearing to decide the ultimate question for the jury in the same case, for example, whether the defendant caused the victim's death."[40]

Although *Geraci* requires that witness tampering be shown by a clear and convincing standard of proof, it is not necessary that defendant's involvement be established by direct evidence.[41] At the fact based hearing to determine if defendant's misconduct caused the unavailability of the witness, hearsay is admissible, and the People may rely in whole or part on circumstantial evidence to meet their foundational burden.[42] A recent example, in the First Department, is *People v. Cotto*, a murder case in which the use of the *Geraci* principle was approved.[43] Here, the People's sole living eyewitness made statements identifying the defendant as the killer.[44] On the eve of trial, he advised the prosecution in a telephone message that he would not identify defendant because "his family was in jeopardy."[45] At a hearing, the assistant district attorney testified that the witness told him that the witness' mother and wife had been approached by unnamed individuals who demanded to know if the witness was going to testify and that they threatened to kill him.[46] There was no direct evidence that the defendant was involved in these intimidating maneuvers.[47] Much of the prosecution's evidence which supported witness tampering consisted of recitals of what prosecutors had been told about what the witness said about conversations between his relatives and the threatening individuals.[48] That, plus the witness' vague expressions of fear for himself and his family, were sufficient to admit the prior hearsay statements identi-

39. *Id.*, 677 N.E.2d at 730, 654 N.Y.S.2d at 1006.
40. *Id.* at 462, 677 N.E.2d at 731, 654 N.Y.S.2d at 1007.
41. People v. Cotto, ___ A.D.2d ___, 658 N.Y.S.2d 278 (1st Dep't 1997).
42. *Id.* at ___, 658 N.Y.S.2d at 278.
43. *Id.* at ___, 658 N.Y.S.2d at 278.
44. *Id.* at ___, 658 N.Y.S.2d at 279.
45. *Id.* at ___, 658 N.Y.S.2d at 279.
46. *Id.* at ___, 658 N.Y.S.2d at 279.
47. *Id.* at ___, 658 N.Y.S.2d at 279.
48. *Id.* at ___, 658 N.Y.S.2d at 279.

fying defendant as the killer.[49]

C. The Present Sense Impression

Several years ago, in *People v. Brown*, New York adopted the present sense impression as a new exception to the rule against hearsay.[50] This exception, a close relative of the long-standing and analytically similar "excited utterance" exception,[51] applies to out-of-court statements that describe or explain an event or condition "made while the declarant was perceiving the event or condition, or immediately thereafter."[52] The timing element makes such statements trustworthy.[53] Immediacy limits the risk of lack of memory and by not allowing time for reflection, tends to mitigate the opportunity to fabricate.[54] Unlike its federal rule counterpart,[55] the Court in *Brown* added a requirement of corroboration to bolster assurances of reliability.[56] Therefore, whereas the gravamen of the excited utterance is its spontaneity and the declarant's excited mental state, the key components of the present sense impression are its contemporaneity and corroboration.[57] As the facts in *Brown* make clear, the present sense impression may apply even when the declarant is an unidentified bystander.[58]

The Court of Appeals in *Brown* left open a number of questions. Does the exception require that the declarant be unavailable as a witness?[59] How strict is the contemporaneity requirement?[60] And what

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49. *Id.* at ___, 658 N.Y.S.2d at 279.

50. 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 (1993).

51. People v. Vasquez, 88 N.Y.2d 561, 573, 670 N.E.2d 1328, 1333-34, 647 N.Y.S.2d 697, 702-703 (1996) ("'Present sense impression' statements and 'excited utterances' are both often loosely described, sometimes misleadingly as 'spontaneous' statements. . . . 'Excited utterances' are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative. 'Present sense impression' declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding." (citation omitted)).

52. *Brown*, 80 N.Y.2d at 732-33, 610 N.E.2d at 371-72, 594 N.Y.S.2d at 698-99.

53. *Id.*, 610 N.E.2d at 371-72, 594 N.Y.S.2d at 698-99.

54. *Id.*, 610 N.E.2d at 371-72, 594 N.Y.S.2d at 698-99.

55. FED. R. EVID. 803(1).

56. 80 N.Y.2d at 739, 610 N.E.2d at 373, 594 N.Y.S.2d at 700.

57. *Vasquez*, 88 N.Y.2d at 574-75, 670 N.E.2d at 1334, 647 N.Y.S.2d at 703.

58. *Brown*, 80 N.Y.2d at 734, 610 N.E.2d at 373, 594 N.Y.S.2d at 700 (stating that "such statements may be admitted even though the declarant is not a participant in the events and is an unidentified bystander"); *see also* People v. Brown, 224 A.D.2d 184, 184, 637 N.Y.S.2d 127, 127 (1st Dep't 1996).

59. The *Brown* Court noted, in a footnote, the difference between the 1982 draft of a proposed Code for New York which required unavailability and Federal Rules 803(1) under which unavailability is immaterial. 80 N.Y.2d at 733 n.1, 610 N.E.2d at 372 n.1, 594

kind of corroboration is required?[61] These questions and the parameters of the present sense impression have been explored in a number of recent decisions.

In *People v. Buie*, the Court of Appeals held that "the present sense impression does not require a showing of the declarant's unavailability as a sine qua non to admissibility, though that factor may be weighed by trial judges in assessing the traditional probativeness versus undue prejudice calculus."[62] In *Buie*, the trial court admitted a recording of a 911 telephone call made by a homeowner.[63] The recording described a burglary in progress and the declarant victim gave a detailed description of the burglar.[64] At trial, the declarant homeowner testified to his version of the burglary.[65] The 911 tape was also received in evidence as a present sense impression over defense objections that (1) because the declarant was available and testified at the trial the hearsay exception was inapplicable and (2) the admission of the 911 tape constituted improper "bolstering" of the credibility of the homeowner witness.[66] The Court of Appeals noted that no other jurisdiction imposes an unavailability requirement for either present sense impressions or for excited utterances, and the majority reasoned that "there is no need in logic or in practical procedural terms to add this extra unavailability requirement."[67] The majority also found the "no bolstering" doctrine inapplicable.[68] It is true that, ordinarily, in New York the prior consistent statement of a witness is not admissible to strengthen the witness' credibility except when used to rebut a claim of recent fabrication.[69] The Court of Appeals, however, explained that prior consistent statements constitute improper bolstering only when they do not fall within any hearsay exception.[70] Here, the declarant's prior statement fulfilled

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N.Y.S.2d at 699 n.1.

60. The Court simply said that the statements must be "substantially contemporaneous" with the observations being described. *Id.* at 734, 610 N.E.2d at 373, 594 N.Y.S.2d at 700.

61. The *Brown* court declined to require corroboration by an equally percipient witness. It stated that the sufficiency of the corroboration must be left largely to the discretion of the trial court. *Id.* at 736-37, 610 N.E.2d at 373-74, 594 N.Y.S.2d at 700-01.

62. 86 N.Y.2d 501, 506, 658 N.E.2d 192, 195, 634 N.Y.S.2d 415, 418 (1995).

63. *Id.* at 506, 658 N.E.2d at 195, 634 N.Y.S.2d at 418.

64. *Id.*, 658 N.E.2d at 195, 634 N.Y.S.2d at 418.

65. *Id.*, 658 N.E.2d at 195, 634 N.Y.S.2d at 418.

66. *Id.*, 658 N.E.2d at 195, 634 N.Y.S.2d at 418.

67. *Id.* at 507, 658 N.E.2d at 196, 634 N.Y.S.2d at 419.

68. *Id.*, 658 N.E.2d at 196, 634 N.Y.S.2d at 419.

69. People v. McDaniel, 81 N.Y.2d 10, 16, 611 N.E.2d 265, 268, 595 N.Y.S.2d 364, 367 (1993).

70. *Buie*, 86 N.Y.2d at 511, 658 N.E.2d at 198, 634 N.Y.S.2d at 421.

the requirements for the present sense impression, and therefore, was properly admitted.[71]

Practical answers to other open questions were provided by application of the contemporaneity and corroboration requirements in *People v. Vasquez*.[72] This decision involved three consolidated cases.[73] All of these cases involved 911 recordings that were offered as present sense impressions but were rejected by the trial judge.[74] The Court of Appeals agreed that in all three situations the tapes failed either the contemporaneity or the corroboration requirement.[75]

In creating the exception for present sense impressions the *Brown* Court indicated that it would cover a statement describing an event when "*or immediately after it occurs.*"[76] In *Vasquez*, the Court explained that by this language it meant the description and the event need not be precisely simultaneous "since it is virtually impossible to describe a rapidly unfolding series of events without some delay between the occurrence and the observer's utterance."[77] However, the Court went on to say, that "the language was certainly not intended to suggest that declarations can qualify as present sense impressions even when they are made after the event being described has concluded."[78] In other words, the description of events must be made "substantially contemporaneously" with the observations.[79] For example, in one of the consolidated *Vasquez* cases, a defendant charged with sexual abuse offered the victim's statement made shortly after the attack in which the victim said he could not identify his attacker.[80] In another of the cases, a murder defendant offered his own 911 call, made after the killing, to the effect that he had been assaulted and had acted only to protect his

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71. *Id.*, 658 N.E.2d at 198, 634 N.Y.S.2d at 421. During the *Survey* period a number of appellate division decisions have rejected the "no bolstering" concept and have admitted prior consistent statements because the statements qualified under the present sense or excited utterance exceptions to the rule against hearsay. *See* People v. Farrell, 228 A.D.2d 693, 646 N.Y.S.2d 124 (2d Dep't 1996); People v. Hughes, 228 A.D.2d 618, 645 N.Y.S.2d 493 (2d Dep't 1996); People v. Holton, 225 A.D.2d 1020, 640 N.Y.S.2d 707 (4th Dep't 1996); People v. Lewis, 222 A.D.2d 1058, 635 N.Y.S.2d 872 (4th Dep't 1995).

72. 88 N.Y.2d at 561, 670 N.E.2d at 1238, 647 N.Y.S.2d at 697.

73. *See id.*, 670 N.E.2d at 1238, 647 N.Y.S.2d at 697.

74. *Id.*, 670 N.E.2d at 1238, 647 N.Y.S.2d at 697.

75. *Id.* at 575-76, 580, 670 N.E.2d at 1328, 1335, 647 N.Y.S.2d at 704, 706.

76. *Brown*, 80 N.Y.2d at 732, 610 N.E.2d at 371, 594 N.Y.S.2d at 698 (emphasis added).

77. *Vasquez*, 88 N.Y.2d at 575, 670 N.E.2d at 1334, 647 N.Y.S.2d at 703.

78. *Id.*, 670 N.E.2d at 1334, 647 N.Y.S.2d at 703.

79. *Id.*, 670 N.E.2d at 1334, 647 N.Y.S.2d at 703.

80. *Id.* at 572, 670 N.E.2d at 1332, 647 N.Y.S.2d at 702.

mother.[81] The Court held that neither of these statements was sufficiently contemporaneous.[82]

The Court in *Vasquez* also undertook the much more difficult task of applying the corroboration requirement.[83] It is not necessary that the event be corroborated by an "equally percipient witness," meaning an eyewitness who also saw the event and will testify in support of the content of the present sense impression.[84] The *Vasquez* Court, however, emphasized that there "must be some independent verification of the declarant's descriptions."[85] The Court made it clear that, contrary to the defendant's arguments, "the corroboration element cannot be established merely by showing that the declarant's statements were unprompted and made at about the time of the reported event."[86] In the consolidated *Vasquez* cases, one defendant, who was charged with reckless endangerment, offered the 911 tape of an anonymous caller who gave a description of the shooter that did not match the appearance of the defendant.[87] The description given in the 911 call was held not sufficiently corroborated by other independent evidence.[88]

New York's acceptance of the present sense impression has opened the door to a large number of tape recorded conversations; mostly 911 telephone calls. Within this *Survey* period alone there have been dozens of appellate division and trial court opinions admitting recordings by police officers,[89] victims,[90] and bystanders[91] under either the present sense impression or the excited utterance exceptions to the rule against hearsay. Two are particularly interesting. In *People v. Simpson*, the Second Department approved the admissibility of a complainant's 911 call even though declarant admitted that she lied in part

81. *Id.* at 571, 670 N.E.2d at 1332, 647 N.Y.S.2d at 701.

82. *Id.* at 578, 580, 670 N.E.2d at 1336, 1338, 647 N.Y.S.2d at 705-06.

83. *Id.* at 575, 670 N.E.2d at 1337, 647 N.Y.S.2d at 706.

84. *Brown*, 80 N.Y.2d at 736-37, 610 N.E.2d at 373-74, 594 N.Y.S.2d at 700-01.

85. *Vasquez*, 88 N.Y.2d at 575, 670 N.E.2d at 1337, 647 N.Y.S.2d at 706.

86. *Id.*, 670 N.E.2d at 1337, 647 N.Y.S.2d at 706.

87. *Id.* at 576, 670 N.E.2d at 1335, 647 N.Y.S.2d at 704.

88. *Id.*, 670 N.E.2d at 1335, 647 N.Y.S.2d at 704.

89. *See* People v. Farrell, 228 A.D.2d 693, 646 N.Y.S.2d 124 (2d Dep't 1996); People v. Mieles, 226 A.D.2d 397, 640 N.Y.S.2d 264 (2d Dep't 1996); People v. Montgomery, 224 A.D.2d 914, 637 N.Y.S.2d 577 (4th Dep't 1996).

90. *See* People v. Hughes, 228 A.D.2d 618, 645 N.Y.S.2d 493 (2d Dep't 1996); People v. Holton, 225 A.D.2d 1020, 640 N.Y.S.2d 707 (4th Dep't 1996); People v. Lewis, 222 A.D.2d 1058, 635 N.Y.S.2d 872 (4th Dep't 1995).

91. People v. Brown, 224 A.D.2d 184, 637 N.Y.S.2d 127 (1st Dep't 1996); People v. Cook, 220 A.D.2d 522, 632 N.Y.S.2d 193 (2d Dep't 1995).

of her telephoned statement.[92] The complainant confessed that she told the 911 operator that defendant had a gun as well as a knife.[93] There was no gun but, as the complainant later explained, she was trying "to get the cops there as quick as possible."[94] The call was admitted as an excited utterance even though the justification for this exception is that excitement stills the ability to reflect and, therefore, the declarant cannot fabricate.[95] On the other hand, in *People v. Anonymous*, the trial court declined to admit "a suspicious statement from a potentially interested person" as a present sense impression even though the statement arguably met the contemporaneity and corroboration requirements of the exception.[96] In *Anonymous*, the defendant was charged with attempted murder and related weapons crimes arising out of a brawl between neighborhood residents.[97] In the course of the investigation, a friend and a relative of the alleged victim told a police officer that "somebody just threw a gun" out of the defendant's apartment.[98] The gun was retrieved, and the ballistics tests revealed that it was the gun used to shoot the victim.[99] At trial, the prosecution sought to have the officer testify to the statement linking defendant to the gun.[100] The defense argued that in view of the declarant's connection with the alleged victim, the declarant himself might have placed the gun at the location where it was found.[101] The court agreed and felt that, because declarant had a strong motive to fabricate, the statement lacked reliability.[102]

D. Admissions

In New York, the statement of an employee may be received as an admission against the employer only if the employee has the authority to speak on behalf of the employer.[103] Contrary to the Federal Rules of Evidence and the modern trend, authority on the part of the employee to

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92. ___ A.D.2d ___, 656 N.Y.S.2d 765 (2d Dep't 1997).
93. *Id.* at ___, 656 N.Y.S.2d at 767.
94. *Id.* at ___, 656 N.Y.S.2d at 767.
95. *Id.* at ___, 656 N.Y.S.2d at 767.
96. N.Y.L.J., June 5, 1996, at 108 (N.Y.C. Crim. Ct., N.Y. Co.).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. Loschiavo v. Port Auth. of N.Y. & N.J., 58 N.Y.2d 1040, 448 N.E.2d 1351, 462 N.Y.S.2d 440 (1983); Kelly v. Diesel Constr., 35 N.Y.2d 1, 315 N.E.2d 751, 358 N.Y.S.2d 685 (1974).

act is not enough; speaking authority is required.[104] As a result of this antiquated and widely criticized limitation, most post-accident employee statements offered by an injured plaintiff against the employer will not be admitted.[105] Several case examples demonstrated this result during the *Survey* period.[106] Each involved the same fact pattern.[107] A store customer is injured when she falls on a wet surface and sues the proprietor.[108] The plaintiff seeks to show that the defendant store had notice of the floor's condition by testifying that after the fall she heard an employee admit prior knowledge of the defect.[109] In *Masotti v. Walbaums Supermarket* and in *Lowen v. Great Atlantic & Pacific Tea Co.*, the Second Department rejected the plaintiff's evidence as inadmissible hearsay and entered summary judgment for defendants.[110]

An extremely strict adherence to the New York limitation occurred in *Williams v. Walbaums Supermarkets, Inc.*[111] In *Williams*, the patron fell on a broken bottle.[112] The plaintiff's affidavit in opposition to summary judgment stated that after her fall, the store manager himself approached and reprimanded a maintenance employee for not cleaning up the spill earlier when he was first called.[113] The Second Department, again, held that the plaintiff's testimony about what the manager said was inadmissible evidence.[114] In the absence of other proof of notice,

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104. *Compare* cases cited *supra* note 103, *with* FED. R. EVID. 801(d)(2)(D) (allowing, as an admission of a party-opponent, "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship").

105. *Loschiavo*, 58 N.Y.2d at 1041, 448 N.E.2d at 1352, 462 N.Y.S.2d at 441 (The Court declined to change the "well settled, albeit widely criticized rule of evidence."). It can be argued that the Court was influenced by the fact that the 1983 Proposed Code of Evidence which was then before the Legislature was modeled upon the more expansive federal rule. Thus the Court may have chosen to leave the matter to the Legislature. However, the Code never passed the Legislature. *See* MARTIN, *supra* note 1, § 8.3.2.; FARRELL, *supra* note 5, § 8-208.

106. *See, e.g.*, Masotti v. Walbaums Supermarket, 227 A.D.2d 532, 642 N.Y.S.2d 950 (2d Dep't 1996); Lowen v. Great Atlantic & Pacific Tea Co., 223 A.D.2d 534, 636 N.Y.S.2d 393 (2d Dep't 1996).

107. *See* cases cited *supra* note 106.

108. *Masotti*, 227 A.D.2d at 532, 642 N.Y.S.2d at 951; *Lowen*, 223 A.D.2d at 535, 636 N.Y.S.2d at 393.

109. *Masotti*, 227 A.D.2d at 533, 642 N.Y.S.2d at 951; *Lowen*, 223 A.D.2d at 535, 636 N.Y.S.2d at 393.

110. *Masotti*, 227 A.D.2d at 502, 642 N.Y.S.2d at 950; *Lowen*, 223 A.D.2d at 534, 636 N.Y.S.2d at 393.

111. 236 A.D.2d 605, 653 N.Y.S.2d 962 (2d Dep't 1997).

112. *Id.* at 605, 653 N.Y.S.2d at 963.

113. *Id.* at 606, 653 N.Y.S.2d at 963.

114. *Id.*, 653 N.Y.S.2d at 963.

summary judgment was entered for defendant.[115] This result is surprising because, here, the speaking agent was a high level employee. As the dissent pointed out, "the direction and oversight of store employees was within the scope of authority granted the manager by defendant."[116] The words of admonishment spoken by the manager appeared to be within his "speaking authority." Indeed, some years ago, the Court of Appeals, in *Bransfield v. Grand Union*, affirmed the admissibility of a manager's statements on similar facts.[117]

We were reminded this year by the Court of Appeals that what one says in one case can come back to haunt the author in subsequent litigation.[118] That is because of the doctrine of "informal judicial admissions."[119] Informal judicial admissions are facts incidentally admitted in a judicial proceeding and contained in trial or deposition testimony, pleadings, affidavits, briefs or any court submissions.[120] When offered against the party in a later case, the admission is not conclusive but is evidence of the admitted facts.[121] *Liquidation of Union Indemnity Insurance Co. of New York v. American Centennial Insurance Co.* is an example.[122] In this complicated reinsurance dispute an affidavit and briefs prepared by the lawyer for one of the parties in a related action were received as admissions.[123]

E. State of Mind

New York recognizes an exception to the rule against hearsay for statements showing declarant's present state of mind.[124] Of course, to be admissible, the state of mind of the declarant must be relevant to a material issue.[125] It often happens that in criminal cases, the victim, sometime before a violent attack or murder, may express fear of the defendant.[126] The victim's expression may be accompanied by a state-

115. *Id.* at 605, 653 N.Y.S.2d at 962.

116. *Id.* at 607, 653 N.Y.S.2d at 964 (Ritter, J., dissenting).

117. 17 N.Y.2d 474, 214 N.E.2d 161, 266 N.Y.S.2d 981 (1965). *But see* Golden v. Horn & Hardart Co., 270 N.Y. 544, 200 N.E. 309 (1936).

118. Liquidation of Union Indem. Ins. Co. of N.Y. v. American Centennial Ins. Co., 89 N.Y.2d 94, 674 N.E.2d 313, 651 N.Y.S.2d 383 (1996).

119. *Id.* at 103, 674 N.E.2d at 317, 651 N.Y.S.2d at 387.

120. *Id.*, 674 N.E.2d at 317, 651 N.Y.S.2d at 387.

121. *Id.*, 674 N.E.2d at 317, 651 N.Y.S.2d at 387.

122. *Id.* at 94, 674 N.E.2d at 313, 651 N.Y.S.2d at 383.

123. *Id.* at 102-03, 674 N.E.2d at 317, 651 N.Y.S.2d at 387.

124. People v. Asmar, 168 Misc. 2d 247, 250, 639 N.Y.S.2d 907, 909 (Nassau Co. Ct. 1996).

125. *Id.* at 250, 639 N.Y.S.2d at 909.

126. *Id.*, 639 N.Y.S.2d at 909.

ment of reasons for the fear.[127] Are victim's statements of fear admissible under the state of mind exception? Usually, the answer is no because in the ordinary case the victim's fear is not considered a relevant issue and its receipt would greatly prejudice the accused.[128] Sometimes, however, the victim's fear may be logically relevant to explain the subsequent conduct of the parties.[129]

An excellent summary of when and why statements of victim fear may be admitted was provided in *People v. Asmar*.[130] In this rape case, the defendant claimed that the intercourse was consensual and that he and complainant had been having sexual relations for months before the alleged act.[131] The People offered testimony from the complainant and from her employer to the effect that one month before the rape the complainant rejected defendant's advances, requested her employer to arrange for the defendant not to be in the store when she was present, and that on one occasion complainant asked a customer to remain in the store when defendant appeared.[132] The court held that these expressions of fear were relevant and admissible.[133] Her fear made it extremely unlikely that she would enter into a consensual amorous relationship with defendant.[134] The court went beyond the facts of this case to give other examples of when statements of victim fear would be relevant.[135] It quoted three situations as follows:

> The most common of these involves defendant's claim of self-defense as justification for the killing. When such a defense is asserted, a defendant's assertion that the deceased first attacked him may be rebutted by the extrajudicial declarations of the victim that he feared the defendant, thus rendering it unlikely that the deceased was in fact the aggressor in the first instance. Second, where defendant seeks to defend on the ground that the deceased committed suicide, evidence that the victim had made statements inconsistent with a suicidal bent are highly relevant. A third situation involves a claim of accidental death, where, for example, defendant's version of the facts is that the victim picked up defendant's gun and was accidentally killed while toying with it. In such cases the deceased's state-

127. *Id.*, 639 N.Y.S.2d at 909.
128. *Id.*, 639 N.Y.S.2d at 909.
129. *Id.*, 639 N.Y.S.2d at 909.
130. *Id.* at 251-52, 639 N.Y.S.2d at 911.
131. *Id.* at 253, 639 N.Y.S.2d at 912.
132. *Id.* at 247, 639 N.Y.S.2d at 908-09.
133. *Id.* at 252, 639 N.Y.S.2d at 911.
134. *Id.*, 639 N.Y.S.2d at 911.
135. *Id.* at 251-52, 639 N.Y.S.2d at 911.

> ments of fear as to guns or of defendant himself (showing he would never go near defendant under any circumstances) are relevant in that they tend to rebut this defense. Of course, even in these cases, where the evidence is of a highly prejudicial nature, it has been held that it must be excluded in spite of a significant degree of relevance.[136]

F. Declaration of Physical Condition

The Federal Rules of Evidence and most jurisdictions recognize an exception to the rule against hearsay for statements of present physical condition.[137] Similarly, most jurisdictions would allow an exception for declarations of past physical condition if the statements are made to medical personnel for the purpose of diagnosis or treatment.[138]

In New York, these principles are clouded by several old Court of Appeals cases. In the case of statements of present physical condition, *Roche v. Brooklyn City & Newtown Railroad Co.* long ago held that such statements were only admissible if they were involuntary expressions of pain, such as groans or screams.[139] A narrative account, such as "[m]y arm hurts," would not be within the exception unless made to a physician for purposes of treatment.[140] It is unlikely that this limitation would survive today. Narrative statements of present physical condition are present sense impressions. Since New York now recognizes the present sense impression as an exception,[141] we may assume that narrative statements of present physical condition to whomever made would also qualify for admissibility as long as corroboration is present.

In the case of statements of past physical condition, older New York authorities recognize no exception at all; not even when the reci-

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136. *Id.* at 252, 639 N.Y.S.2d at 911.

137. A widely followed example is a hearsay exception for "a statement of the declarant's then existing . . . physical condition (such as . . . pain, and bodily health)." FED. R. EVID. 803(3).

138. *See* FED. R. EVID. 803(4) (delineating an exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment").

139. 105 N.Y. 297, 297, 11 N.E. 634, 634 (1887).

140. There is no exception if the statement is made to a physician hired to testify rather than to treat. *See* Davidson v. Cornell, 132 N.Y. 228, 237-38, 30 N.E. 573, 576 (1892). *Tromblee v. North American Accident Insurance Co.*, 173 A.D. 174, 176, 158 N.Y.S. 1014, 1016 (3d Dep't 1916), later held that statements of present bodily condition could be admitted if declarant is dead at the time of trial.

141. People v. Brown, 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 (1993).

tation of medical history is made to a treating physician.[142] Statements of medical history may be admitted, in the case of a treating physician, only to explain the basis of the expert opinion of the doctor, but not for the truth of the content of the medical history.[143] Even this limited use is forbidden if the doctor to whom the statements are made was retained for litigation purposes.[144] Indeed, a physician who has not treated a patient may not testify to the patient's statements of present or past physical condition—not even for the non-hearsay purpose of explaining the basis for a courtroom opinion.[145]

There are signs that some courts are moving away from this restrictive approach. A recent example is *People v. Randall*.[146] In this rape case, the victim related the details to her treating physician.[147] At trial, the doctor was allowed to testify concerning the victim's statements of the past event, including details of the assault.[148] The First Department approved, saying simply that these details were relevant to the doctor's treatment and diagnosis.[149]

G. Official Records: Investigative Reports

The Federal Rules of Evidence provide an expansive hearsay exception for "factual findings resulting from an investigation made pursuant to authority granted by law."[150] The term factual findings has been held by the United States Supreme Court to include opinions, conclusions or evaluations contained in official investigative reports.[151]

New York has a series of statutes regarding certain specific records and certificates.[152] CPLR 4520, the only general provision, is much more limited than its federal counterpart.[153] Nevertheless, some

142. *Davidson*, 132 N.Y. at 228, 30 N.E. at 573; *see* FARRELL, *supra* note 5, § 8-610.
143. *Davidson*, 132 N.Y. at 237, 30 N.E. at 576.
144. *Id.*, 30 N.E. at 576.
145. *Id.*, 30 N.E. at 576.
146. 227 A.D.2d 131, 641 N.Y.S.2d 639 (1st Dep't 1996).
147. *Id.* at 131, 641 N.Y.S.2d at 640.
148. *Id.*, 641 N.Y.S.2d at 640.
149. *Id.*, 641 N.Y.S.2d at 640.
150. FED. R. EVID. 803(8)(c).
151. Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988).
152. There are, for example, provisions for ancient filed maps, N.Y. CIV. PRAC. L. & R. 4522 (McKinney 1992); records of out-of-state real property conveyances, *id.* § 4524 ; marriage certificates, *id.* § 4526 (McKinney Supp. 1997); weather reports, *id.* § 4528 (McKinney 1992); birth and death certificates, N.Y. PUB. HEALTH LAW § 4103(3) (McKinney 1985); and many others. For a more complete list, see BARKER & ALEXANDER, *supra* note 5, § 803(5).1.
153. N.Y. CPLR 4520 (McKinney 1992) (applying only to official affidavits or certifi-

New York cases have applied a common law exception for public records.[154] Some of these decisions adopt a federal rule approach to official investigative reports.[155]

An example during the *Survey* period is *Bogdan v. Peekskill Community Hospital*.[156] The plaintiff, an anesthesiologist who had been suspended by the defendant hospital, sued for breach of contract.[157] To prove plaintiff's incompetence, the hospital offered reports of the Office of Professional Medical Conduct.[158] These documents reported the result of the hearings held by the office and included findings of fact, determinations as to departures by plaintiff from generally accepted standards of practice, and conclusions as to whether there were instances of gross negligence or incompetence.[159] Plaintiff, in turn, offered findings by the Public Health Council, stating that the hospital had acted improperly in summarily suspending the plaintiff.[160] The court found that CPLR 4520, which admits certificates or affidavits of public officers prepared in the course of their official duties, was not applicable because the documents at issue were neither certificates nor affidavits.[161] The court, however, found that the admissibility of some of the reports may be appropriate under the broader common law public document exception.[162] In citing Federal Rule of Evidence 803(8)(c), the court concluded that a common thread runs through both federal and state cases.[163] The court, then, listed six rules governing the admissibility of official investigative reports as follows:

> (1) Factual findings and inferences which reasonably flow therefrom are admissible.
>
> (2) Opinions may be admissible, if sufficiently supported by the

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cates and stating: "Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated.").

154. Cramer v. Kuhns, 213 A.D.2d 131, 630 N.Y.S.2d 128 (3d Dep't 1995); Bogdan v. Peekskill Community Hosp., 168 Misc. 2d 856, 642 N.Y.S.2d 478 (Sup. Ct., Westchester Co. 1996).

155. *See* cases cited *supra* note 154.

156. 168 Misc. 2d at 856, 642 N.Y.S.2d at 478.

157. *Id.*, 642 N.Y.S.2d at 478.

158. *Id.* at 858, 642 N.Y.S.2d at 480.

159. *Id.*, 642 N.Y.S.2d at 480.

160. *Id.* at 861, 642 N.Y.S.2d at 482.

161. *Id.* at 860, 642 N.Y.S.2d at 482.

162. *Id.* at 858, 642 N.Y.S.2d at 478.

163. *Id.* at 860, 642 N.Y.S.2d at 481-82.

facts, and provided by a qualified declarant.

(3) The report may not be used as a vehicle to admit into evidence information which would otherwise be inadmissible.

(4) Conclusions of law are not admissible.

(5) The court must be satisfied that the factual findings are supported by evidence which is trustworthy, and result from an investigative process which is free of bias. In order to make this determination it is necessary that the report contain sufficient detail.

(6) The trial court has broad discretion in determining issues of trustworthiness and relevance, and must exercise such discretion in deciding whether a report, or portions thereof, should be admitted.[164]

In applying these principles, the court admitted the findings of fact that resulted from the detailed hearings held by the Office of Professional Medical Conduct.[165] The court refused, however, to admit its conclusions of law.[166] The Public Health Council report was rejected because of its brief and conclusory nature and because "[n]o hearings were held and no investigation [was] conducted beyond consideration of written submissions from each party."[167]

H. Pedigree

When family relationship is relevant, declarations relating to birth, lineage, marriage, death, legitimacy, dissent or succession are admissible under the exception for statements of pedigree.[168] The declarant must be related by blood or affinity to the family referred to in the statement[169] and the existence of this relationship requires at least some "slight" independent corroboration.[170]

The status of two other requirements is unclear in New York. Granted that the declarant must be unavailable to testify, is death the only acceptable form of unavailability? A turn of the century Court of

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164. *Id.*, 642 N.Y.S.2d at 481-82.

165. *Id.* at 861, 642 N.Y.S.2d at 482.

166. *Id.*, 642 N.Y.S.2d at 482.

167. *Id.* at 861-62, 642 N.Y.S.2d at 482.

168. Aalholm v. People, 211 N.Y. 406, 414, 105 N.E. 647, 650 (1914); Washington v. Bank for Savings in City of N.Y., 171 N.Y. 166, 173, 33 N.E. 831, 833 (1902); Eisenlord v. Clum, 126 N.Y. 552, 563-64, 27 N.E. 1024, 1027 (1891).

169. *Aalholm*, 211 N.Y. at 412-13, 105 N.E. at 649; Young v. Shulenberg, 165 N.Y. 385, 388, 59 N.E. 135, 136 (1901).

170. *Young*, 165 N.Y. at 387, 59 N.E. at 136; People v. Keller, 168 Misc. 2d 693, 696, 641 N.Y.S.2d 980, 982 (Sup. Ct., Monroe Co. 1996).

Appeals case so held, but most modern decisions will accept other forms of unavailability.[171] A second source of confusion is the often expressed requirement that the controversy must be genealogical; that is, pedigree must be directly in issue and not merely an incidental question.[172] This restriction is also questionable.

People v. Keller is an example of judicial rejection of both limitations.[173] In this larceny case, the defendant was seen driving from the scene of the thefts.[174] In order to show the connection between the fleeing car and the defendant, a police officer testified that the owner of the car stated that she was the defendant's grandmother.[175] The statement was admitted under the pedigree exception even though (1) the grandmother declarant was alive but otherwise unavailable and (2) the case was not a genealogical dispute.[176]

II. OPINIONS AND EXPERTS

A. Basis for Expert Opinion

There are two doctrines that were combined to produce significant decisions during the *Survey* period. The first principle is the so-called *Frye* test.[177] Expert testimony involving the use of scientific theories or techniques will be admissible only upon a showing that the theories or techniques have gained general acceptance in the relevant scientific community.[178] New York has applied this standard to a wide range of scientific evidence including DNA profiling,[179] rape trauma syn-

171. *Young*, 165 N.Y. at 388, 59 N.E. at 136 (stating that the declarant must be "dead, incompetent or beyond the jurisdiction of the court"). *But see Aalholm*, 211 N.Y. at 412, 105 N.E. at 649 (stating that "[t]he declarant must be deceased").

172. People v. Lammes, 208 A.D. 533, 203 N.Y.S. 736 (4th Dep't 1924).

173. *Keller*, 168 Misc. 2d at 693, 641 N.Y.S.2d at 980.

174. *Id.* at 694, 641 N.Y.S.2d at 980.

175. *Id.*, 641 N.Y.S.2d at 980.

176. *Id.* at 695, 641 N.Y.S. at 981.

177. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

178. *Id.* Although New York continues to adhere to the conservative *Frye* general acceptance standard, it has been abandoned in federal courts. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), a unanimous Supreme Court held that *Frye* has been superseded in federal courts by Federal Rule of Evidence 702, which specifically governs expert testimony. Nothing in the text of this rule established "general acceptance" as an absolute prerequisite to admissibility. The Court noted that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'" *Id.* at 588.

179. *See* People v. Wesley, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

drome,[180] hypnotically restored testimony,[181] polygraph test results,[182] bite mark identification,[183] hair analysis to discover cocaine use,[184] voiceprints,[185] and studies on the unreliability of eyewitness identification.[186] The second principle involves the expansion of the acceptable basis for expert testimony provided for in *People v. Sugden*.[187] It allows an expert to base an opinion upon inadmissible data as long as the data is of a kind accepted in the profession as reliable.[188] Both these doctrines are expressions of the need to ensure reliability of the theory or the facts underlying an expert opinion.

The Court of Appeals, in two recent decisions, makes clear that it is willing to allow an expert to state an opinion based on out-of-court data only when there is a showing that the specific data relied upon, if it is of a scientific nature, meets the *Frye* general acceptance standard.

People v. Angelo is one recent example.[189] Here, the defendant, a hospital nurse and the so-called Angel of Death, was charged with depraved indifference murder after injecting patients with a neuromuscular blocking agent that caused them to stop breathing.[190] The defense called an expert psychiatrist to testify that the defendant suffered from a dissociative disorder, which led him to inject the patients so that he could then participate in heroic efforts to save them.[191] The expert was prepared to conclude that the dissociative disorder caused the defendant to be unaware of the dangers of injecting the patients.[192] Critical to this conclusion was the defendant's answer to a question during a polygraph examination, in which he stated that he had not been present when any

180. *See* People v. Taylor, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990).

181. *See* People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

182. *See* People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969).

183. *See* People v. Middleton, 54 N.Y.2d 42, 429 N.E.2d 100, 444 N.Y.S.2d 581 (1981).

184. *See* Adoption of Baby Boy L., 157 Misc. 2d 353, 596 N.Y.S.2d 997 (Fam. Ct., Suffolk Co. 1993).

185. *See* People v. Bein, 114 Misc. 2d 1021, 453 N.Y.S.2d 343 (Sup. Ct., N.Y. Co. 1982).

186. *See* People v. Mooney, 76 N.Y.2d 827, 599 N.E.2d 1274, 560 N.Y.S.2d 115 (1990).

187. 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974).

188. *Id.* at 460, 323 N.E.2d at 173, 363 N.Y.S.2d at 929.

189. 88 N.Y.2d 217, 666 N.E.2d 1333, 644 N.Y.S.2d 460 (1996).

190. *Id.* at 220, 666 N.E.2d at 1334, 644 N.Y.S.2d at 460.

191. *Id.*, 666 N.E.2d at 1334, 644 N.Y.S.2d at 460.

192. *Id.*, 666 N.E.2d at 1334, 644 N.Y.S.2d at 460.

of the patients had died, when in fact he was actually present.[193] The defendant's answer had registered as truthful, and the expert's diagnosis hinged on the fact that the defendant thought he was not present when in fact he was.[194] The Court of Appeals held that this part of the expert's testimony was properly excluded since the expert was relying on non-record evidence that was not reliable.[195] The *Angelo* Court stated that the *Sugden* rule incorporates "the customary admissibility test for expert scientific evidence—which looks to general acceptance of the procedures and methodology as reliable within the scientific community."[196] Since polygraph evidence fails the *Frye* test, it could not be used as the basis for an expert's opinion under *Sugden.*[197]

People v. Wernick applied this very principle in the context of section 60.55 of the Criminal Procedure Law.[198] Section 60.55 provides a narrow exception for the introduction of hearsay when the accused asserts an affirmative defense based upon mental disease or defect.[199] Under this statute, any psychiatrist or psychologist who has examined the defendant and offers an opinion on defendant's mental capacity at the time of the crime "must be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion."[200] In *Wernick*, the Court held that this provision does not obviate the need for a *Frye* hearing to assess the reliability and general acceptance of the scientific basis for the opinion.[201] The defendant, a twenty year old student, asphyxiated her baby after giving birth in the bathroom of a college dormitory and was convicted of criminally negligent homicide.[202] On the affirmative defense of insanity, the defendant provided expert testimony about "neonaticide," a pattern of conduct or psychiatric profile of women who kill their babies immediately after birth.[203] In a six to one opinion, the Court found that defense's psychiatrists should not have been allowed "to parade before the jury non-testifying experts' publications about a theoretical profile, without a reliability foundation being

193. *Id.*, 666 N.E.2d at 1334, 644 N.Y.S.2d at 460.
194. *Id.*, 666 N.E.2d at 1334, 644 N.Y.S.2d at 460.
195. *Id.* at 223, 666 N.E.2d at 1336, 694 N.Y.S.2d at 463.
196. *Id.* at 222-23, 666 N.E.2d at 1335, 644 N.Y.S.2d at 462.
197. *Id.*, 666 N.E.2d at 1335, 644 N.Y.S.2d at 462.
198. 89 N.Y.2d 111, 117-18, 674 N.E.2d 322, 325-26, 651 N.Y.S.2d 392, 395-96 (1996).
199. N.Y. CPL 60.55(1) (McKinney 1992).
200. *Wernick*, 89 N.Y.2d at 118, 674 N.E.2d at 326, 651 N.Y.S.2d at 396.
201. *Id.* at 117, 674 N.E.2d at 325, 651 N.Y.S.2d at 395.
202. *Id.* at 113, 674 N.E.2d at 323, 651 N.Y.S.2d at 392.
203. *Id.* at 113-14, 674 N.E.2d at 323, 651 N.Y.S.2d at 392-93.

satisfied at the threshold."[204]

As already indicated, the *Sugden* doctrine allows an expert to base an opinion upon extra-record material of a kind accepted as reliable in the expert's profession.[205] However, in order to benefit from this "professional reliability source, evidence must be presented establishing the reliability of the out-of-court material."[206] In other words, it is not enough to show that experts in the field traditionally or generally rely on this kind of out-of-court material which forms the basis for the expert's testimony. The proponent must go further and show that the specific extra-record data in the particular case is in fact reliable.[207]

This limitation on the *Sugden* expansion was developed in the 1984 Court of Appeals decision in *Hambsch v. New York City Transit*.[208] In *Hambsch*, a physician sought to testify that the plaintiff suffered from spondylolisthesis, a misalignment of the vertebra of the lower back, and that this condition was caused by a fracture.[209] The opinions were based, in part, on an X ray of the plaintiff's lower back and, in part, on a discussion between the testifying doctor and a radiologist.[210] In affirming the exclusion of such testimony, the Court of Appeals recognized that a doctor making professional decisions in his practice would rely on sources such as X rays and the views of specialists.[211] However, the Court stated that "in order to qualify for the 'professional reliability' exception there must be evidence establishing the reliability of the out-of-court material" and that exclusion was proper because "plaintiff presented no such evidence."[212]

The recent decision in *Velez v. Svehla* emphasized the need to establish the reliability of out-of-court material which is relied upon by an expert.[213] In this personal injury action, the key issue was whether the plaintiff's back problems constituted "serious injury" under the no fault law.[214] The defendant's expert was allowed to testify that statistics

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204. *Id.* at 117-18, 674 N.E.2d at 325, 651 N.Y.S.2d at 395.

205. *Sugden*, 35 N.Y.2d at 453, 323 N.E.2d at 169, 363 N.Y.S.2d at 923.

206. *Angelo*, 88 N.Y.2d at 223, 666 N.E.2d at 1335, 644 N.Y.S.2d at 462 (citing Hambsch v. New York City Transit, 63 N.Y.2d 723, 726, 469 N.E.2d 516, 518, 480 N.Y.S.2d 195, 197 (1984)).

207. *See* MARTIN, *supra* note 1, § 7.3.3.

208. 63 N.Y.2d at 723, 469 N.E.2d at 516, 480 N.Y.S.2d at 195.

209. *Id.* at 725, 469 N.E.2d at 517, 480 N.Y.S.2d at 196.

210. *Id.*, 469 N.E.2d at 517, 480 N.Y.S.2d at 195.

211. *Id.* at 726, 469 N.E.2d at 518, 480 N.Y.S.2d at 197.

212. *Id.*, 469 N.E.2d at 518, 480 N.Y.S.2d at 197.

213. 229 A.D.2d 528, 529, 645 N.Y.S.2d 842, 843 (2d Dep't 1996).

214. *Id.* at 529, 645 N.Y.S.2d at 842.

show that MRI examinations of completely asymptomatic young individuals, who never complained of back pain, would reveal that a high percentage would have positive studies like those of the plaintiff.[215] The Second Department reversed because the basis for the statistical testimony was not revealed.[216] The Court, quoting the *Hambsch* requirement, stated that if an expert relies on out-of-court material, "there must be evidence establishing the reliability of the out-of-court material."[217]

Hambsch held, in effect, that where a medical expert's conclusions are based upon an analysis of X Rays of a plaintiff's injuries, the failure to introduce the X Rays may constitute error.[218] *Pegg v. Shahin*, however, decided during the *Survey* period, indicates that this is not always true.[219] In this personal injury case, the court applied *Sugden* without the *Hambsch* limitation.[220] The treating physicians were allowed to testify to injuries based in part on X Rays and MRI tests because these are the kinds of data ordinarily accepted by experts in the field.[221] Failure to produce the X Rays did not affect the admissibility of the doctor's opinions.[222] The Second Department distinguished *Hambsch* on the ground that, here, the medical findings were based on clinical observations and physical examinations as well as the X Rays.[223] The court emphasized that the references to the X Rays and the MRI test, for the most part, served to confirm the conclusions drawn by the respective experts following their independent examination of these plaintiffs.[224]

B. Appropriateness of Expert Testimony

For many years, New York followed the traditional view that allowed expert testimony only on issues that were "beyond the ken" of the ordinary juror.[225] The Federal Rules of Evidence relaxed this necessity standard and substituted a "helpfulness" test based upon on the ra-

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215. *Id.*, 645 N.Y.S.2d at 843.
216. *Id.*, 645 N.Y.S.2d at 843.
217. *Id.*, 645 N.Y.S.2d at 843.
218. 63 N.Y.2d 723, 725, 469 N.E.2d 516, 517, 480 N.Y.S.2d 195, 196 (1984).
219. 237 A.D.2d 271, 654 N.Y.S.2d 395 (2d Dep't 1997).
220. *Id.* at 271, 654 N.Y.S.2d at 396.
221. *Id.*, 654 N.Y.S.2d at 396.
222. *Id.*, 654 N.Y.S.2d at 396.
223. *Id.*, 654 N.Y.S.2d at 396.
224. *Id.*, 654 N.Y.S.2d at 396.
225. Kulak v. Nationwide Mutual Ins. Co., 40 N.Y.2d 140, 148, 351 N.E.2d 735, 740, 386 N.Y.S.2d 87, 92 (1976).

tionale that specialized knowledge is often helpful, even as to ordinary matters, because it may add precision or depth to the understanding of the trier of fact.[226] In recent years, commentators have suggested that New York is moving toward the federal standard; that is, an expert may testify even as to matters that are within the competence of jurors, if the expert can assist by deepening or sharpening their comprehension.[227] There is support for this view, but many cases continue to use the "beyond the ken" language.[228] A recent example is *Fortunato v. Dover Union Free School District*, an action for damages arising out of a school playground injury.[229] The plaintiff's expert was not allowed to express opinions about the lack of playground supervision or the existence of defective conditions resulting from disassembled and discarded playground equipment.[230] The Second Department held that such issues were within the ordinary intelligence of the jury.[231] The court stressed a necessity test by stating that "unless jurors are unable or incompetent to evaluate the evidence and draw inferences and conclusions, the opinions of experts, which intrude on the province of the jury, are both unnecessary and improper."[232]

In 1987, the Court of Appeals recognized that child abuse syndrome is an accepted medical diagnosis.[233] Such evidence has been held to be a fit subject for expert testimony because "the average juror does not have a general awareness of a young victim's reaction to sodomy or sexual abuse."[234] Evidence of child abuse is not admissible, however, when offered to establish that the victim is truthful; that is, that the victim was in fact sexually abused.[235] The evidence is proper when offered to explain victim behavior that might otherwise appear unusual to the jury.[236] Thus, expert testimony in this area has been

226. FED. R. EVID 702 ("If scientific, technical, or other specialized knowledge will *assist* the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto . . . ." (emphasis added)).

227. FARRELL, *supra* note 5, § 7-301; MARTIN, *supra* note 1, § 7.2.2.

228. *Kulak*, 40 N.Y.2d at 148, 351 N.E.2d at 740, 386 N.Y.S.2d at 92.

229. 224 A.D.2d 658, 658, 638 N.Y.S.2d 727, 728 (2d Dep't 1996).

230. *Id.* at 658, 638 N.Y.S.2d at 728.

231. *Id.*, 638 N.Y.S.2d at 728.

232. *Id.*, 638 N.Y.S.2d at 728.

233. *In re* Nicole V., 71 N.Y.2d 112, 120, 518 N.E.2d 914, 917, 524 N.Y.S.2d 19, 23 (1987).

234. People v. Benjamin R., 103 A.D.2d 663, 669, 481 N.Y.S.2d 827, 832 (4th Dep't 1984).

235. People v. Shay, 210 A.D.2d 736, 737, 620 N.Y.S.2d 189, 190 (3d Dep't 1994).

236. *Id.* at 737, 620 N.Y.S.2d at 190.

permitted to explain why a victim did not promptly complain[237] or why a victim was unwilling to admit that she had been abused.[238]

Limitations on the admissibility of expert testimony involving abused child syndrome were explored in two recent Third Department cases. In *People v. Seaman*, the People's expert testimony concerning the syndrome was received ostensibly for the proper purpose of explaining the victim's failure to promptly report the abuse.[239] At trial, however, the expert testified at one point that "any one of these [behavioral changes of the victim] might not be indicative of sexual abuse but looking at the pattern they all fit somebody that has been sexually traumatized."[240] Moreover, the prosecution on summation emphasized this testimony by reminding the jury that the expert told them that "those things are the kind of things you would expect to see."[241] The court reversed the defendant's conviction because the expert testimony was used for the purpose of proving that the crime occurred and that the victim had been sodomized.[242] Similarly, in *People v. Archer*, the prosecutor posed a hypothetical question to the expert that subsumed the evidence in this case and asked if the hypothetical victim's behavior was unusual with respect to child abuse syndrome.[243] This was error, albeit harmless, in light of later curative testimony and instructions.[244] In short, syndrome evidence cannot be admitted in a form which turns it into "expert psychological testimony about the victim's credibility."[245]

C. Degree of Certainty

A testifying expert must exhibit "a degree of confidence in his conclusions sufficient to satisfy accepted standards of reliability."[246] The preferred and most often used standard in New York is to have the expert testify to a "reasonable degree of certainty."[247] However, there

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237. People v. Bennett, 79 N.Y.2d 464, 593 N.E.2d 279, 583 N.Y.S.2d 825 (1992).

238. People v. Whitehead, 142 A.D.2d 745, 531 N.Y.S.2d 48 (3d Dep't 1988).

239. 239 A.D.2d 681, ___, 657 N.Y.S.2d 242, 244 (3d Dep't 1997).

240. *Id.* at ___, 657 N.Y.S.2d at 244.

241. *Id.* at ___, 657 N.Y.S.2d at 244.

242. *Id.* at ___, 657 N.Y.S.2d at 244-45.

243. 232 A.D.2d 820, 822, 649 N.Y.S.2d 204, 206 (3d Dep't 1996).

244. *Id.* at 822, 649 N.Y.S.2d at 206.

245. People v. Grady, 125 A.D.2d 1011, 1011, 508 N.Y.S.2d 359, 359 (1st Dep't 1986).

246. Matott v. Ward, 48 N.Y.2d 455, 459, 399 N.E.2d 532, 534, 423 N.Y.S.2d 645, 647 (1979).

247. McKilligan v. McKilligan, 156 A.D.2d 904, 907, 550 N.Y.S.2d 121, 124 (3d

are no magic words. Any formulation will suffice if the opinion "reflects an acceptable level of certainty" or an "equivalent assurance that it was not based on either supposition or speculation."[248] These principles were expounded once again recently in *John v. City of N.Y.*[249] In this negligence action, the plaintiff's medical opinion was not expressed in terms of a "reasonable degree of medical certainty."[250] Nonetheless, it was held to be admissible because the opinion was formulated in a way that ensured that it was more than speculation.[251]

D. Expert Opinion in Federal Courts

In 1993, the United States Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals*, abandoned the *Frye* "general acceptance" test for scientific evidence in federal courts.[252] The Court went on to state, however, that under the Federal Evidence Rule 703, the trial judge must act as gatekeeper.[253] As a condition to admissibility, the proponent of scientific expertise must satisfy the judge that the methodology is scientifically valid.[254] The Supreme Court laid out certain criteria to assist in the determination of reliability.[255] This decision mandates careful scrutiny of complicated expert testimony. A question that has plagued federal courts involves the scope of this decision. Does *Daubert* and its criteria apply to all kinds of expertise or only to scientific evidence or, perhaps, only to novel scientific evidence? Federal Courts have taken a variety of approaches.

One of the latest decisions on this question was reached in the Southern District of New York in *Liriano v. Hobart Corp.*[256] In this products liability action, the plaintiff was injured when his hand was caught in a commercial meat grinder.[257] The plaintiff's expert was an

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Dep't 1987).

248. *Ward*, 48 N.Y.2d at 460, 463, 399 N.E.2d at 534, 536, 423 N.Y.S.2d at 647, 649.

249. 235 A.D.2d 210, 652 N.Y.S.2d 15 (1st Dep't 1997).

250. *Id* at 210, 652 N.Y.S.2d at 16.

251. *Id.*, 652 N.Y.S.2d at 16.

252. 509 U.S. 579, 579 (1993).

253. *Id.* at 579.

254. *Id.* at 580.

255. *Id.* at 593-94. These criteria included (1) whether the theory underlying the opinion was testable; (2) whether the scientific technique had in fact been tested; (3) whether the theory or technique had been subjected to peer review; (4) the known or potential rate of error of the particular technique and the maintenance of standards controlling the technique's operation; (5) the degree of acceptance of the theory or technique within the scientific community. *Id.*

256. 949 F. Supp. 171 (S.D.N.Y. 1996).

257. *Id.* at 173.

engineer and safety consultant who testified that the meat grinder was defective by virtue of its inadequate warning.[258] His opinion, arguably, would not have met the *Daubert* criteria since he had not actually tested the machine.[259] His conclusion was based largely upon personal inspection.[260] Nevertheless, the expert testimony was admitted, and the court held that the *Daubert* criteria did not govern.[261] Instead, the expert testimony was assessed under the traditional, liberal "helpfulness" standard of Federal Rule of Evidence 702.[262] The court stated:

> Properly understood, the *Daubert* analysis applies to cases involving unique, untested, or controversial methodologies or techniques. . . . It is not appropriate to invoke the *Daubert* test in cases where expert testimony is based solely on experience or training, as opposed to a methodology or technique. Indeed, it would be impossible to do so. Expert opinion based on personal experience cannot always be evaluated on the basis of "rate of error," "peer review" or "general acceptance" in the relevant scientific community. Yet such opinions may be as valuable to the trier of fact as those opinions that can be readily gauged in such terms.[263]

One of the issues now being litigated in federal courts involves an intriguing discovery question. It goes without saying that pre-trial discovery is critically important for effective cross-examination of a testifying expert. How far does discovery of the expert's basis extend? If one party shows its expert—one retained to give testimony at trial—documents to help the expert prepare, are those documents discoverable by the other side? Normally, the answer would be yes. But what if the materials shown to the expert constitute attorney work product, perhaps core or opinion work product? What if the documents or information shared with the expert constitute not only the hiring attorney's thoughts and case strategies but also client communications that would usually be protected by attorney-client privilege? Are the protections waived by the act of showing the materials to the expert?

For many years, there was considerable controversy which centered upon the scope of discovery authorized by Rule 26 of the Federal Rules of Civil Procedure.[264] On the one hand, Rule 26(b)(4) provides

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258. *Id.* at 176.
259. *Id.* at 177.
260. *Id.*
261. *Id.* at 178.
262. *Id.*
263. *Id.* at 177.
264. FED. R. CIV. P. 26.

for broad discovery from testifying experts of "facts known or opinions held by the expert."[265] On the other hand, Rule 26(b)(3) provided that even when work product is disclosed "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney."[266]

Some believed that the matter was clarified by the 1993 amendments to Rule 26 which added a new provision requiring the testifying expert to submit a written signed report.[267] Rule 26(a)(2)(B) now provides:

> disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case . . . , be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; [and] the data or other information considered by the witness in forming the opinions . . .[268]

The Advisory Committee note to this provision explains:

> [t]he report is to disclose the data and other information considered by the expert . . . . Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure . . . .[269]

It therefore appears that anything—whether core opinion work product or not—that is shared with the expert is now required to be disclosed. A number of district courts have so held including a 1997 decision in the Southern District of New York.[270] In *BCF Oil Refining, Inc. v. Consolidated Edison Co. of New York*, the court concluded that the obvious intent of the 1993 amendment is to require the parties to produce attorney opinions given to the expert regardless of their status as core work product.[271] Somewhat surprisingly however, the conflict on this issue has continued. A different conclusion was expressed by the

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265. *Id.* at 26(b)(4).

266. *Id.* at 26(b)(3). Compare the contrasting rule interpretations and policies relied upon in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984), with those in *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Ca. 1991).

267. FED. R. CIV. P. 26(a)(2)(B).

268. *Id.*

269. *Id.* advisory committee's notes.

270. *See infra* note 271 and accompanying text.

271. 171 F.R.D. 57, 67 (S.D.N.Y. 1997).

Eastern District of New York in *Magee v. The Paul Revere Life Insurance Co.*[272] *Magee* reflects the view that opinion work product protection is not lost upon disclosure to the testifying expert.[273] The reasoning here is that only the facts shared with the expert are discoverable while the protected documents containing those facts and the opinions contained in the documents are not.[274] This conflict between district courts in New York is being played out in other federal jurisdictions.[275]

III. RELEVANCE

A. The Offer to Stipulate

It goes without saying that evidence is relevant if it has any tendency to prove a material fact.[276] Even if it is relevant, evidence may still be excluded by the trial court if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, misleading the jury, or waste of time.[277] Can the opponent of relevant but potentially prejudicial evidence block its admission by offering to stipulate to the fact that the evidence is offered to prove? In theory, such an offer to stipulate would remove the need for such evidence; thus depriving it of its probative value. A stipulation, however, is a voluntary agreement. The question is whether the proponent of the evidence can be required to accept the offer to stipulate in place of actual proof of a material issue.

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272. 172 F.R.D. 627, 639 (E.D.N.Y. 1997).

273. *Id.* at 639.

274. *Id.*

275. *Compare* Karn v. Rand, 168 F.R.D. 633 (N.D. Ind. 1996) (waiver of core work product), *and* Caruso v. Coleman Co., 1994 WL 719759 (E.D. Pa. 1994), *and* Baxter v. Diagnostics, Inc. v. AVL Scientific Corp., 1993 WL 360674 (C.D. Cal. 1993), *and* Emergency Care Dynamics, Ltd. v. Superior Court, 932 P.2d 297 (Ariz. Ct. App. 1997), *with* Hayworth, Inc. v. Herman Miller, Inc. 162 F.R.D. 289 (W.D. Mich. 1995), *and* All West Pet Supply Co. v. Hill's Pet Products, 152 F.R.D. 634 (D. Kan. 1993) (holding that the privilege is not lost when attorney opinions are communicated to the testifying expert). *See also*, Gregory Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 100-06 (1996).

276. People v. Scarola, 71 N.Y.2d 769, 777, 525 N.E.2d 728, 732, 530 N.Y.S.2d 83, 86 (1988). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

277. *Scarola*, 71 N.Y.2d at 777, 525 N.E.2d at 732, 530 N.Y.S.2d at 86. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." FED. R. EVID. 403.

New York courts have been reluctant to require the substitution of stipulations for actual proof. A leading New York case decided some years ago is a good example. In *People v. Hills*, the Second Department addressed the legal effect of an offer by the defendant in a criminal trial to stipulate to a material element of a crime charged.[278] In *Hills*, the defendant was convicted of first degree robbery and first degree assault.[279] Before trial, the defendant offered to stipulate that the victim, as a result of the criminal attack, suffered "serious physical injury," a statutory element of the crimes charged.[280] The prosecutor declined the offer.[281] Defense counsel then moved for "the trial court to preclude the prosecution from adducing medical testimony concerning the victim's injuries on the ground that such testimony 'would create undue prejudice' to the defendant."[282] The trial court denied this request.[283] The appellate division upheld the trial court's decision, stating that it was incumbent upon the prosecution to prove beyond a reasonable doubt that the victim suffered serious physical injury.[284] The court decreed that: "[E]xcept in situations where a statute provides otherwise, the decision as to whether to decline or accept such a stipulation lies wholly within the prosecutor's discretion."[285]

The *Hills* court explained that, by definition, "a stipulation is a voluntary agreement between the parties, not a unilateral decision of one party forced upon another," and that the risks involved in accepting or refusing an offered stipulation "do not call for the involuntary imposition of a particular strategy by either the opposing counsel or the court."[286] At the conclusion of a well-reasoned discussion of the issue, the New York court ruled, in sum:

> [A] prosecutor may not be compelled to accept a stipulation as to an element of a crime since "a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence*. Moreover, "[s]o long as the defendant maintained his not guilty plea, the State had the right to prove its case up to the hilt in whatever manner it chose, subject only to the

278. 140 A.D.2d 71, 532 N.Y.S.2d 269 (2d Dep't), *appeal denied*, 73 N.Y.2d 855, 534 N.E.2d 340, 537 N.Y.S.2d 502 (1988).

279. *Id.* at 76, 532 N.Y.S.2d at 272.

280. *Id.* at 74, 76, 532 N.Y.S.2d at 271-72.

281. *Id.* at 74, 532 N.Y.S.2d at 271.

282. *Id.*, 532 N.Y.S.2d at 271.

283. *Id.*, 532 N.Y.S.2d at 271.

284. *Id.* at 77, 79, 532 N.Y.S.2d at 273-74.

285. *Id.* at 77, 532 N.Y.S.2d at 273 (citation omitted).

286. *Id.*, 532 N.Y.S.2d at 273.

rules of evidence and standards of fair play."[287]

This effect of an offer to stipulate in a somewhat different context was addressed during the *Survey* period by the United States Supreme Court in an important 5 to 4 decision.[288] In *Old Chief v. United States*, the Supreme Court ruled that in prosecutions for being a felon in possession of a firearm, a federal district court abuses its discretion if it spurns the defendant's offer to concede the fact of his prior conviction and instead admits the full record of the prior criminal judgment.[289] This is true, said the Court, at least when "the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of the prior conviction."[290]

After a fracas involving at least one gunshot, the petitioner, Old Chief, was charged with violating 18 U.S.C. section 922(g)(1), which prohibits possession of a firearm by anyone with a prior felony conviction.[291] He offered to stipulate to the prior-conviction element, and he argued that his offer rendered evidence of the name and nature of his prior offense, an assault causing serious bodily injury, inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403.[292] The Government refused to join the stipulation, however, insisting on its right to present its own evidence of the prior conviction.[293] The district court agreed with the Government.[294] At trial, the Government introduced the judgment record for the prior conviction, and a jury convicted Old Chief.[295]

In affirming the conviction, the court of appeals found that the Government was entitled to introduce probative evidence to prove the prior offense regardless of the stipulation offer, saying that "a stipulation is not proof, and, thus, it has no place in the FRE 403 balancing process."[296] The Supreme Court opinion began by conceding that the prior offense evidence contained in the official record was relevant.[297]

287. *Id.* at 83, 532 N.Y.S.2d at 277 (citation omitted).
288. *See infra* note 289 and accompanying text.
289. 117 S. Ct. 644 (1997).
290. *Id.* at 647.
291. *Id.*
292. *Id.* at 648.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 649.
297. *Id.*

Turning next to the issue of prejudice, the majority held that in balancing the probative value against the danger of unfair prejudice, the proffered evidence should not be looked at in isolation.[298] The "full evidentiary context of the case" must be considered.[299] Therefore, the probative value of the proffered evidentiary item should be "calculated by comparing evidentiary alternatives."[300] The mere fact that two pieces of evidence might go to the same issue would not necessarily mean that only one should be admitted.[301] The Court, however, said that a judge "could reasonably apply some discount to the probative value of an item of evidence when faced with a less risky alternative proof going to the same point."[302]

In dealing with the felon-in possession charge, the Court went on to explain that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice whenever the official record would be arresting enough to lure a juror into a sequence of bad-character reasoning.[303] Old Chief sensibly worried about the prejudicial effect of his prior offense.[304] His proffered admission also presented the district court with alternative, relevant, admissible, and seemingly conclusive evidence of the prior conviction.[305] Thus, while the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission.[306]

The majority opinion held that the accepted rule which allows the prosecution to prove its case free from any defendant's option to stipulate the evidence away has virtually no application when the point at issue is a defendant's legal status.[307] Here, the most the jury needed to know was that the admitted conviction fell within the class of crimes that Congress thought should bar a convict from possessing a gun.[308] Since there was no cognizable difference between the evidentiary significance of the admission and the official record's legitimately probative component, and because the functions of the competing evidence

298. *Id.* at 651.
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* at 652.
304. *Id.*
305. *Id.* at 653.
306. *Id.*
307. *Id.* at 654.
308. *Id.* at 655.

were distinguishable only by the risk inherent in the one and wholly absent from the other, the only reasonable conclusion was that the risk of unfair prejudice substantially outweighed the conviction record's discounted probative value.[309] Thus, it was an abuse of discretion to admit the conviction record when the defendant's admission was available.[310]

Although the holding of *Old Chief* was a victory for the accused, the scope of this decision is narrowly confined. First, it is expressly limited to offers to stipulate to the prior felony element of felon-in-possession cases.[311] Second, even in this limited class of cases, an abuse of discretion is not automatic.[312] Rejection of the offer to stipulate will be disapproved only if "the name and nature of the prior felony raises the risk of a verdict tainted by improper considerations."[313] Third, in its reasoning, the majority opinion suggested that in other situations the defendant's offer to stipulate will have little or no effect.[314] This can be seen by comparing the *Old Chief* opinion with other types of cases.

For example, one might ask whether the *Old Chief* reasoning might influence a New York court to re-examine the result in cases like *People v. Hills*.[315] Clearly not. In *Hills*, the defendant, who was charged with first degree robbery, sought to block evidence of the medical condition of the victim by offering to stipulate that the victim had suffered "serious physical injury" which was one of the elements of the charged crime.[316] What happened to the victim is part of the narrative of the crime.[317] In *Old Chief*, the stipulation concerned prior felony status, an event wholly separate and independent of the narrative of the defendants subsequently charged conduct.[318] The majority opinion in *Old Chief* recognized that when the evidence concerns the story of the crime, the prosecution is entitled to prove its case by evidence of its own choice.[319] Further, the prosecution is entitled to present to the jury

309. *Id.*
310. *Id.*
311. *Id.* at 651 n.7 ("[O]ur holding is limited to cases involving proof of felon status.").
312. *Id.* at 652.
313. *Id.*
314. *Id.*
315. 140 A.D.2d 71, 532 N.Y.S.2d 269 (2d Dep't 1988).
316. *Id.* at 74, 76, 532 N.Y.S.2d at 271-72.
317. *Id.* at 81, 532 N.Y.S.2d at 275.
318. *Old Chief*, 117 S. Ct. at 654.
319. *Id.*

a picture of the events relied upon.[320] To substitute for such a picture, a naked admission might rob the evidence of much of its weight.[321] In short, the *Old Chief* majority emphasized that in most situations offers to stipulate may be ignored.[322]

> [T]he accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.[323]

The offer to stipulate may also be featured in cases where other crimes or prior acts of uncharged misconduct are offered by the prosecution to establish relevant non-character issues. In general, evidence of an accused's prior acts of misconduct is not admissible at the initiative of the prosecution if the sole purpose is to show defendant's character or criminal propensity.[324] Evidence of uncharged crimes or misconduct may be admissible, however, under the *Molineaux* doctrine when they are relevant to establish, among other things, issues such as motive, intent, absence of mistake or accident, common plan or scheme, or identity.[325]

Assume, for instance, that defendant is accused of possession of cocaine and heroin with intent to distribute. In order to prove knowledge and intent under Federal Rule of Evidence 404(b), the prosecution offers evidence that defendant was involved in three prior cocaine sales. Such evidence would not be admissible if offered solely to prove bad

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320. *Id.*

321. *Id.* at 653-54.

322. *Id.* at 654.

323. *Id.* at 654.

324. People v. Lewis, 69 N.Y.2d 321, 506 N.E.2d 915, 514 N.Y.S.2d 205 (1987); FED. R. EVID. 404(b) (stating the generally accepted rule that "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith").

325. People v. Molineaux, 168 N.Y. 264, 61 N.E. 286 (1901). Evidence of other crimes, wrongs or acts may be admitted for non-character, non-propensity purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." FED. R. EVID. 404(b).

character or a disposition toward drug dealing. However, if offered to show intent, knowledge or modus operandi, many courts would admit it. But what if the defendant offers to stipulate to knowledge and intent and wishes to dispute only the element of possession? In other words, the accused admits that the possessor had knowledge and intent but denies that he is the possessor. Will such an offer limit the prosecution's proof?

That issue was squarely presented in *United States v. Crowder*, a court of appeals decision from the District of Columbia Circuit which was decided before *Old Chief*.[326] In *Crowder*, the defense was that the police, looking for the one who had possessed drugs earlier in the evening, arrested the wrong man.[327] The District of Columbia Circuit, sitting en banc, concluded, over a strong dissent, that the defendant's offer to stipulate rendered the prosecution evidence inadmissible.[328] The *Crowder* court held that

> a defendant's offer to concede knowledge and intent combined with an explicit jury instruction that the Government no longer needs to prove either element gives the Government everything the evidence could show with respect to those two elements, doing so without risk that the jury will use the evidence for impermissible propensity purposes.[329]

Crowder reflects the Second Circuit approach where it has been held that bad acts evidence must be relevant to an "actual issue" and that an offer by defendant to stipulate to an issue removes it from the case, thereby precluding admission of the bad act evidence.[330] Both the *Crowder* decision and the Second Circuit approach will have to be reexamined. In the first place, the United States Supreme Court vacated *Crowder* and remanded it for further consideration in light of the *Old Chief* opinion.[331] More to the point, the *Old Chief* majority explicitly distinguished the felon-in-possession situation from stipulations relating to bad act evidence by stating that:

> [I]f, indeed, there were a justification for receiving evidence of the nature of prior acts on some issue other than status (i.e., to prove "motive, opportunity, intent, preparation, plan, knowledge, identity,

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326. 87 F.3d 1405 (D.C. Cir. 1996).

327. *Id.* at 1408.

328. *Id.* at 1413.

329. *Id.* at 1410.

330. United States v. Figueroa, 618 F.2d 934, 942 (2d Cir. 1980); United States v. Mohel, 604 F.2d 748, 751 (2d Cir. 1979).

331. 117 S. Ct. 760, 760 (1997).

or absence of mistake or accident"), Rule 404(b) *guarantees* the opportunity to seek its admission.[332]

B. Character to Infer Conduct in Civil Cases

It is well-established under New York and federal law that in a criminal prosecution the accused may introduce evidence of his good character to show that he is unlikely to have committed the crime charged.[333] Federal Evidence Rule 404(a)(1), which is consistent with New York decisions, expressly permits "evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same."[334] What if it is a civil case, but it is a civil case that involves charges against either plaintiff or defendant of criminal conduct? Suppose, for example, the plaintiff sues a fire insurance company to recover for the loss of a building. The insurance company's defense is arson. In this civil suit, the plaintiff is being charged with arson. May the plaintiff offer character evidence to negate the likelihood of arson? Or suppose the victim of an assault sues his assailant for damages. May the defendant in this civil assault case offer evidence of his peaceful character?

Nothing in the federal rules of evidence expressly authorizes such character evidence in civil cases. Surprisingly, however, there are a few federal decisions authorizing the use of character evidence to benefit the party charged with criminal conduct in civil cases.[335] The rationale is that evidence of the pertinent character trait inconsistent with the charged misconduct has as much probative worth in civil cases as it does in criminal cases.[336] Therefore, the civil litigant is given the same option that is open to the accused.[337] Allowing this criminal case exception to spill over into civil cases can have a broad impact. It would permit character evidence anytime an issue is raised involving arson, assault, conversion, fraud, misrepresentation, theft, RICO violations or any other act involving a violation of criminal law.

Apparently, neither New York nor the majority of federal courts

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332. *Old Chief*, 117 S. Ct. at 655 (citation omitted and emphasis added).

333. People v. Aharonowicz, 71 N.Y.2d 678, 681, 525 N.E.2d 458, 459, 529 N.Y.S.2d 736, 737 (1988); FED. R. EVID. 404(a)(1).

334. FED. R. EVID. 404(a)(1); *see Aharonowicz*, 71 N.Y.2d at 681, 525 N.E.2d at 459, 529 N.Y.S.2d at 737.

335. Perrin v. Anderson, 784 F.2d 1040, 1044 (10th Cir. 1986); Crumpton v. Donfederation Life Ins. Co., 672 F.2d 1248, 1253 (5th Cir. 1982).

336. *Crumpton*, 672 F.2d at 1253.

337. *Id.*

approve of this expansion of the use of character evidence.[338] This was confirmed during the *Survey* period by the federal district court in the Southern District of New York in *Securities & Exchange Commission v. Towers Financial Corp.*[339] In this civil action involving securities fraud, the defendant sought to present a number of character witnesses.[340] The defense argued that the authorization in Rule 404(a)(1) for the "accused" to use character evidence should be broadly interpreted and that the word "accused" should include the defendant in a "quasi-criminal" civil proceeding.[341] The district court rejected these arguments holding that "accused" means a person formally charged with commission of a crime in a criminal case.[342] Moreover, the court noted that the use of the word "prosecution" in Rule 404(a)(1) also strongly suggests that the exception allowing use of character propensity evidence is limited to criminal cases.[343]

It is well settled that evidence of prior, similar acts is usually inadmissible to prove that the defendant perpetrated the same act on a later related occasion.[344] However, in civil or criminal cases charging sexual misconduct, other acts of the same kind of misconduct are sometimes admitted to show modus operandi, intent, habit or routine practice.[345] The New York Court of Appeals, however, continues to demonstrate its reluctance to admit prior act evidence.

In *Coopersmith v. Gold*, the plaintiff-patient accused the defendant-psychiatrist of medical malpractice for engaging in a sexual relationship with her during the doctor-patient relationship.[346] The defendant denied that a sexual relationship ever occurred.[347] At trial, the plaintiff attempted to call four of defendant's former patients to testify that they had also been sexually involved with defendant while they

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338. Fanelli v. Lorenzo, 187 A.D.2d 1004, 1005, 591 N.Y.S.2d 658, 679 (4th Dep't 1992); Brennan v. Commonwealth Bank & Trust Co., 65 A.D.2d 636, 637, 409 N.Y.S.2d 266, 268 (3d Dep't 1978); 2 JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE § 404.03(3) (2d ed. 1997).

339. 966 F. Supp. 203, 204 (S.D.N.Y. 1997).

340. *Id.* at 204.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. Chomicki v. Wittenkind, 381 N.W.2d 561 (Wis. Ct. App. 1985) (plaintiff tenant in harassment suit allowed to show four prior incidents of sexual misconduct involving other tenants as evidence that defendant landlord had a habit or routine practice of harassing his female tenants).

346. 89 N.Y.2d 957, 958, 678 N.E.2d 469, 470, 655 N.Y.S.2d 857, 858 (1997).

347. *Id.* at 958, 678 N.E.2d at 470, 655 N.Y.S.2d at 858.

were patients and that each relationship followed a similar pattern.[348] The Court of Appeals agreed with the trial court that such testimony was "too collateral" to the issue at hand and was highly prejudicial.[349] After both parties had rested, the plaintiff again tried to introduce testimony from two of the defendant's former patients.[350] She argued that since the trial court had allowed the defendant to introduce the surgical scars on his torso in an attempt to refute plaintiff's contention that they had had a multi-year affair, the defendant had opened the door and she should then be able to explain why she did not observe the scars.[351] The plaintiff contended that the defendant's former patients would confirm her story that the defendant's sexual practices prevented her from observing the scars.[352] The Court of Appeals, concluding that the plaintiff's objective was simply to challenge the defendant's credibility and to rehabilitate her own, which were collateral matters, again upheld the trial court's denial of plaintiff's application.[353]

IV. PRIVILEGES

A. Psychotherapist-Patient Privilege

In New York, communications related to mental or emotional health are protected from disclosure by a group of statutes.[354] Thus, such communications can be privileged if made to psychiatrists,[355] psychologists,[356] social worker[357] or rape crisis counselors[358] as well as other health care professionals. The governing provision for federal courts left the matter for case law development under Federal Rule of Evidence 501 which provides that federal privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[359] Until now, the status of the psychotherapist-patient privilege in federal

348. *Id.*, 678 N.E.2d at 470, 655 N.Y.S.2d at 858.
349. *Id.* at 959, 678 N.E.2d at 470, 655 N.Y.S.2d at 858.
350. *Id.*, 678 N.E.2d at 470, 655 N.Y.S.2d at 858.
351. *Id.*, 678 N.E.2d at 470, 655 N.Y.S.2d at 858.
352. *Id.*, 678 N.E.2d at 470, 655 N.Y.S.2d at 858.
353. *Id.*, 678 N.E.2d at 470, 655 N.Y.S.2d at 858.
354. N.Y. CPLR 4504, 4507-4508 (McKinney 1992); *id.* § 4510 (McKinney Supp. 1998).
355. *Id.* § 4504 (McKinney 1992).
356. *Id.* § 4507.
357. *Id.* § 4508.
358. *Id.* § 4510 (McKinney Supp. 1998).
359. FED. R. EVID. 501.

courts has been in doubt because of a conflict among the circuits.[360]

In *Jaffee v. Redmond*, the United States Supreme Court recognized a broad psychotherapist-patient privilege for the first time.[361] The case arose when the decedent was shot and killed by Redmond, an off-duty police officer who was responding to a "fight in progress" call.[362] The decedent's administrator sued the officer and her municipal employer alleging that the decedent's constitutional rights were violated.[363] The administrator sought access to notes made by a licensed clinical social worker during counseling sessions with officer Redmond after the shooting.[364] In recognizing a psychotherapist-patient privilege, the Supreme Court reasoned that effective psychotherapy requires "frank and complete disclosure" that can only be obtained in "an atmosphere of confidence and trust."[365] Therefore, the Court concluded that protection of confidential disclosures was warranted.[366] The Court rejected a case by case balancing of interests which would measure the need for disclosure against the particular privacy interest to be protected.[367] Instead, it reasoned that the privilege must be absolute and certain in order to be effective because "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[368] The Court also concluded that the privilege extends beyond just communications made to psychiatrists or psychologists.[369] It applies also to treatment provided by clinical social workers.[370]

B. Physician-Patient Privilege

By statute, New York recognizes a privilege for information ac-

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360. Some circuits refused to recognize any psychotherapist-patient privilege because no such protection existed at common law. *See, e.g.*, *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989). Other circuits recognized a qualified protection which can be overcome if, in the interests of justice, the evidentiary need for the disclosure outweighs the patient's privacy interest. *See, e.g.*, United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1994). Other circuits recognized an absolute privilege. *See, e.g.*, *In re* Doe, 964 F.2d 1325 (2d Cir. 1992).

361. Jaffee v. Redmond, 116 S. Ct. 1923, 1927 (1996).

362. *Id.* at 1925.

363. *Id.* at 1926.

364. *Id.*

365. *Id.* at 1928.

366. *Id.* at 1928-29.

367. *Id.* at 1932.

368. *Id.* (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

369. *Id.* at 1937-38.

370. *Id.* at 1937.

quired by a physician while attending a patient in a professional capacity.[371] This privilege is not absolute, however. The Legislature has enacted a number of narrow exceptions abrogating the privilege for various public policy reasons.[372] One series of exceptions in Public Health Law sections 3372, 3373 and 3374 require that professionals promptly report any person under treatment "who is an addict or habitual user of any narcotic drug"[373] and that they also report "theft . . . or possible diversion of controlled substances."[374]

In *People v. Sinski*, the New York Court of Appeals held that these exceptions generally cannot be used to abrogate the physician-patient privilege in criminal drug prosecutions.[375] Defendant Sinski was convicted of crimes based on evidence that he unlawfully altered drug prescriptions which he obtained from his dentists and physicians who treated him for dental problems and a serious back condition.[376] The conviction was based upon the prosecution's use of information provided by the defendant's physicians and dentists.[377] The defendant appealed, claiming that this information was privileged and should not have been admitted in evidence against him.[378] The People argued that sections 3372, 3373 and 3374 of the Public Health Law operate as a kind of crime fraud exception that abrogates the physician-patient privilege in this case.[379]

The Court of Appeals disagreed and reversed the defendant's conviction.[380] The Court reasoned that the Public Health provisions have a limited record keeping purpose and that although some disclosure is required, the legislative intent was that patient confidentiality be otherwise preserved.[381] Although the People argued for a crime fraud exception, the Court noted that there was no claim here that defendant

371. N.Y. CPLR 4504 (McKinney 1992).

372. *See, e.g.*, N.Y. CPLR 4504(b) (disclosure of dental identification data and information concerning a victim of crime under age 16); *id.* § 4504(c) (information as to the mental or physical condition of a deceased patient); N.Y. FAM CT. ACT § 1046(a)(vii) (McKinney Supp. 1998) (no privilege in child abuse or neglect proceedings); N.Y. PUB. HEALTH LAW § 2101 (McKinney 1993) (requiring disclosure of a communicable disease); N.Y. PENAL LAW § 265.25 (McKinney 1989) (requiring disclosure of gunshot wounds).

373. N.Y. PUB. HEALTH LAW § 3372 (McKinney 1993).

374. *Id.* § 3374.

375. 88 N.Y.2d 487, 494, 669 N.E.2d 809, 812, 646 N.Y.S.2d 651, 654 (1996).

376. *Id.* at 490, 669 N.E.2d at 810, 646 N.Y.S.2d at 652.

377. *Id.*, 669 N.E.2d at 810, 646 N.Y.S.2d at 652.

378. *Id.*, 669 N.E.2d at 810, 646 N.Y.S.2d at 652.

379. *Id.* at 494, 669 N.E.2d at 812, 646 N.Y.S.2d at 654.

380. *Id.* at 490, 669 N.E.2d at 810, 646 N.Y.S.2d at 652.

381. *Id.* at 493-94, 669 N.E.2d at 812, 646 N.Y.S.2d at 652.

visited doctors solely to obtain drugs.[382] The prosecution never disputed the defendant's need for palliative drugs to mitigate his pain.[383] In short, the Public Health Law provisions were not "intended to override the physician-patient privilege contained in CPLR 4504 and make confidential information generally available to law enforcement agencies in drug cases."[384]

C. Journalist Privilege

New York's "Shield Law" exempts professional journalists and newscasters from being punished for refusing to disclose certain categories of news or news services.[385] This journalist-newscaster protection contains two privileges.[386] First, there is an absolute privilege for "any news obtained or received in confidence or the identity of the source of any such news."[387] Secondly, there is a qualified privilege for "any unpublished news . . . or the source of any such news."[388] The latter qualified privilege may be vitiated by "a clear and specific showing that the news: (1) is highly material and relevant; (2) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (3) is not obtainable from any alternative source."[389]

The difficulty of overcoming the qualified privilege was demonstrated in a recent Second Circuit decision interpreting the New York statute. *Application to Quash Subpoena to National Broadcasting Co. v. Graco Children Products, Inc.* was a products liability action in which the parents sued the manufacturer of an infant cradle alleging defects that caused their infant son to suffocate while swinging in the cradle.[390] The defendant claimed the death resulted from Sudden Infant Death Syndrome and was not related in any way to any product defect.[391] The plaintiff-parents and their attorney appeared on "Dateline," an NBC telecast, and they discussed how the child died as well as their allegations against the defendant manufacturer.[392] The defendant served a subpoena on NBC seeking to discover interview outtakes of

382. *Id.* at 494, 669 N.E.2d at 813, 646 N.Y.S.2d at 655.
383. *Id.*, 669 N.E.2d at 813, 646 N.Y.S.2d at 655.
384. *Id.* at 495, 669 N.E.2d at 813, 646 N.Y.S.2d at 655.
385. N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1997-1998).
386. *See id.*
387. *Id.* § 79-h(b).
388. *Id.* § 79-h(c).
389. *Id.*
390. 79 F.3d 346, 348-49 (2d Cir. 1996).
391. *Id.* at 349.
392. *Id.*

interviews with the plaintiff mother and the attorney.[393] The defendant argued that the outtakes were necessary to its defense because they might reveal statements that could be admissions or because they could be used to impeach the trial testimony of plaintiffs.[394] NBC's motion to quash the subpoena was denied by the district court.[395]

The court of appeals reversed, finding that the defendant had not shown two of the conditions necessary to overcome the qualified privilege.[396] The court noted that the outtakes could be relevant and helpful to defendant but held that they were not "critical or necessary to the maintenance" of a "defense."[397] The test for this standard "is not merely that the material be helpful or probative but whether or not the defense of the action may be presented without it."[398] The court concluded that the "critical or necessary" showing requires a finding that the claim for which the material is to be used "virtually rises or falls with the admission or exclusion of the proffered evidence."[399] While the outtakes might be relevant for impeachment purposes, their utility for this purpose does not meet the standard for overcoming the privilege.[400] Moreover, the court found that defendant also failed to show that the information was unavailable from other sources.[401] The plaintiff parents and the medical examiner clearly were available to answer questions or to be deposed about the child's death.[402] Thus, the defendant failed to exhaust other available sources.[403] The approach of the Second Circuit has been followed in two other New York decisions that were decided during the *Survey* period.[404]

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393. *Id.*

394. *Id.* at 350.

395. *Id.*

396. *Id.* at 351, 353.

397. *Id.* at 352; *see* N.Y. CIV. RIGHTS LAW § 79-h(c).

398. *Graco Children Products*, 79 F.3d at 351 (quoting Doe v. Cummings, No. 91-346, 1994 WL 315640, at *1 (Sup. Ct., St. Lawrence Co. Jan. 18, 1994)).

399. *Id.*

400. *Id.* at 352.

401. *Id.* at 353.

402. *Id.*

403. *Id.*

404. Flynn v. NYP Holdings, Inc., 235 A.D.2d 907, 652 N.Y.S.2d 833 (3d Dep't 1997); *In re* Movant CBS, Inc., 232 A.D.2d 291, 648 N.Y.S.2d 443 (1st Dep't 1996).

V. WITNESSES

A. Pre-Trial Statements of Witnesses: Rosario

In 1961, the New York Court of Appeals established the People's duty to disclose to the defense any witness statements and other information in the prosecutor's and police agencies' possession.[405] The so-called *Rosario* rule was later codified by statute.[406] Underscoring the seriousness of the *Rosario* obligation, the Court of Appeals subsequently refused to apply a harmless error analysis in cases involving a direct appeal in which the defendant was deprived of *Rosario* material.[407] Thus, in *People v. Ranghelle*, the Court found that any violation of *Rosario* required reversal, regardless of the good faith of the prosecutor and regardless of whether the violation affected the outcome of the trial.[408] Although this automatic reversal rule applies to direct appeals, the Court, in *People v. Jackson*, held that it does not apply to post-trial N.Y. CPL 440.10 motions brought after defendant's direct appeal had been concluded.[409] The *Jackson* court relied on the express language of N.Y. CPL 440.10 which affords a collateral review remedy only upon a showing of prejudice.[410]

A problem arises when the defendant combines a direct appeal with an application for relief under N.Y. CPL 440.10. What standard applies under these circumstances to the N.Y. CPL 440.10 motion if it is brought while direct appeals are pending?

In a 1997 decision, *People v. Machado*, the Court of Appeals held that N.Y. CPL 440.10 requires proof of prejudice regardless of whether a direct appeal is pending.[411] Defendant Machado filed his direct appeal in 1990.[412] Seven months later, the prosecutors, for the first time, disclosed the report of the detective in charge of the case who testified at the trial.[413] The defendant was denied permission to enlarge the record on appeal to include the report so he filed his N.Y. CPL 440 motion

405. People v. Rosario, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 450 (1961).

406. N.Y. CPL 240.44, 240.45 (McKinney 1993).

407. *See, e.g.*, People v. Ranghelle, 69 N.Y.2d 56, 63, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986).

408. *Id.*, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585; *see also* People v. Consolazio, 40 N.Y.2d 446, 454, 354 N.E.2d 801, 805, 387 N.Y.S.2d 62, 66 (1976).

409. 78 N.Y.2d 638, 641, 585 N.E.2d 795, 797, 578 N.Y.S.2d 483, 485 (1991).

410. *Id.*, 585 N.E.2d at 797, 578 N.Y.S.2d at 485.

411. 90 N.Y.2d 187, 192, 681 N.E.2d 409, 412, 659 N.Y.S.2d 242, 245 (1997).

412. *Id.* at 188-89, 681 N.E.2d at 410, 459 N.Y.S.2d at 243.

413. *Id.* at 189-90, 681 N.E.2d at 410, 459 N.Y.S.2d at 243.

while the appeal was pending.[414] When the 440 motion came before the appellate division, it held that the per se reversal rule applied because the motion was filed before the time for a direct appeal was exhausted.[415] The Court of Appeals reversed, declaring that the prejudice requirement applies to all *Rosario* claims raised in N.Y. CPL 440 motions.[416] The Court reasoned that it could not give the prejudice requirement of the statute one meaning in a pre-appeal context and another meaning in a post-appeal situation.[417] Moreover, the *Machado* Court concluded that the standard applied to N.Y. CPL 440 motions should not depend on the amount of time it takes to resolve a pending appeal.[418] The Court stated:

> Apart from the fact that defendant's interpretation would ascribe two different meanings to the very same statutory word, an anomaly would arise from variations in the amount of time it takes to resolve an appeal in the Appellate Divisions. Where the appellate backlog is greater a defendant would have an increased opportunity for per se reversal. Application of CPL 440.10(1)(f) should be uniform, wherever defendant's appeal is pending.[419]

B. Cross-Examination and Impeachment

It is clear that a private citizen ordinarily has no legal obligation to volunteer information which exculpates an accused.[420] Therefore, when a witness testifies for the defense, the People usually may not suggest that his failure to come forward earlier indicates that the witness has "flawed moral character or is generally unworthy of belief."[421] However, in certain situations such cross-examination by the prosecution is appropriate.[422] The Court of Appeals has held that an alibi witness may be questioned about his failure to come forward if "the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory information, had a reasonable motive for acting to exonerate the defendant and, finally, was familiar with the means to make such information available to law

414. *Id.* at 190, 681 N.E.2d at 411, 459 N.Y.S.2d at 244.
415. *Id.*, 681 N.E.2d at 411, 459 N.Y.S.2d at 244.
416. *Id.* at 194, 681 N.E.2d at 413, 459 N.Y.S.2d at 246.
417. *Id.* at 192, 681 N.E.2d at 412, 459 N.Y.S.2d at 245.
418. *Id.*, 681 N.E.2d at 412, 459 N.Y.S.2d at 245.
419. *Id.*, 681 N.E.2d at 412, 659 N.Y.S.2d at 245.
420. People v. Dawson, 50 N.Y.2d 311, 318, 406 N.E.2d 771, 775, 428 N.Y.S.2d 914, 918 (1980).
421. *Id.* at 318, 406 N.E.2d at 775, 428 N.Y.S.2d at 918.
422. *Id.* at 321 n.4, 406 N.E.2d at 777 n.4, 428 N.Y.S.2d at 921 n.4.

enforcement authorities."[423]

The Court of Appeals has revisited this issue during the *Survey* period. In *People v. Jenkins*, the defendant was charged with first degree robbery.[424] At trial, the court concluded that it would be proper for the prosecutor to question the defendant's alibi witness as to the fact that the witness, who was defendant's uncle, knew the defendant had been in jail since the date of arrest, had the information regarding the defendant's alibi, and yet did not come forward earlier with this exculpatory information.[425] The court reasoned that the witness's failure to come forward earlier bore on the credibility of the witness, especially since the witness was a relative of the defendant.[426]

On appeal, the defendant argued that the prosecutor's questioning, which elicited responses by the witness commenting upon the defendant's incarcerated status, violated his constitutional right to a fair trial because this testimony compromised the presumption of innocence.[427] The Court of Appeals disagreed, stating that the questioning of the witness served the legitimate state interest of probing the issue of the credibility of the witness's testimony as to the defendant's alibi.[428] However, the Court was careful to explain that in the future such questioning should be limited to cases where "the relationship between the defendant and the witness, or other circumstances, indicates that the witness would have strong incentive to come forward with exculpatory evidence, and no reason was revealed that would have impelled the witness not to make such disclosure."[429]

An accused who waives the Fifth Amendment privilege and testifies at trial generally may be cross-examined regarding prior criminal or immoral acts affecting credibility.[430] However, a testifying defendant does not automatically waive the privilege as to questions concerning pending criminal charges unrelated to the case at trial.[431] Thus, the Court of Appeals held in *People v. Bett* that cross-examination of a defendant at trial for credibility purposes with respect to unrelated pend-

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423. *Id.*, 406 N.E.2d at 777 n.4, 428 N.Y.S.2d at 921 n.4.

424. 88 N.Y.2d 948, 949, 670 N.E.2d 441, 442, 647 N.Y.S.2d 157, 158 (1996).

425. *Id.* at 948, 670 N.E.2d at 442, 647 N.Y.S.2d at 158.

426. *Id.* at 950, 670 N.E.2d at 442, 647 N.Y.S.2d at 158.

427. *Id.*, 670 N.E.2d at 442, 647 N.Y.S.2d at 158.

428. *Id.* at 951, 670 N.E.2d at 443, 647 N.Y.S.2d at 159.

429. *Id.*, 670 N.E.2d at 443, 647 N.Y.S.2d at 159.

430. People v. Bennett, 79 N.Y.2d 464, 468, 593 N.E.2d 279, 281, 583 N.Y.S.2d 825, 827 (1992); People v. Sorge, 301 N.Y. 198, 200, 93 N.E.2d 637, 638 (1950).

431. People v. Betts, 70 N.Y.2d 289, 289, 514 N.E.2d 865, 865, 520 N.Y.S.2d 370, 370 (1987).

ing charges is prohibited.[432] *Betts* was premised on a recognition that forcing a defendant to sacrifice the privilege against self-incrimination as to a pending charge in order to take the stand in one's own defense in an unrelated case exerts an undeniable chilling effect upon a real choice whether to testify.[433] Does the same rule apply when the defendant testifies not at trial but before the grand jury? The People have argued that the *Betts* rule is not applicable to grand jury testimony because the right to testify in grand jury proceedings derives from statute rather than the constitution.[434] A prospective defendant has no constitutional right to testify before the grand jury.[435] It is N.Y. CPL 190.50(5) that confers that right.[436] Is the scope of the defendant's waiver greater before the grand jury than at trial?

In *People v. Smith*, the Court of Appeals held that the *Betts* rule applies to grand jury proceedings just as it does at trial.[437] The Court ruled that a defendant who testifies before a grand jury does not waive the Fifth Amendment privilege against self-incrimination regarding unrelated pending charges against the defendant.[438] In 1992, the defendant was first charged with perjury resulting from earlier false testimony before the grand jury when he stated that he had never been arrested for or convicted of robbery.[439] One week later, the defendant was charged with larceny in an unrelated matter and defendant was produced to testify at the grand jury.[440] The prosecution notified the defense that it intended to question defendant regarding his past convictions, including the defendant's earlier robbery conviction.[441] The defendant's counsel instructed defendant not to answer questions regarding the robbery conviction because it would incriminate him on the pending perjury charge.[442] The grand jury judge held that the prosecutor could cross-examine defendant about his prior robbery conviction, and the defendant could not refuse to answer.[443] The defendant then elected not to

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432. *Id.* at 289, 514 N.E.2d at 865, 520 N.Y.S.2d at 370.

433. *Id.* at 292, 514 N.E.2d at 866, 520 N.Y.S.2d at 371.

434. People v. Smith, 87 N.Y.2d 715, 718, 665 N.E.2d 138, 140, 642 N.Y.S.2d 568, 570 (1996).

435. *Id.* at 718, 665 N.E.2d at 140, 642 N.Y.S.2d at 570.

436. *Id.* at 717, 665 N.E.2d at 140, 642 N.Y.S.2d at 570.

437. *Id.* at 722, 665 N.E.2d at 142-43, 642 N.Y.S.2d at 572-73.

438. *Id.*, 665 N.E.2d at 142-43, 642 N.Y.S.2d at 572-73.

439. *Id.* at 717, 665 N.E.2d at 140, 642 N.Y.S.2d at 571.

440. *Id.*, 665 N.E.2d at 140, 642 N.Y.S.2d at 571.

441. *Id.*, 665 N.E.2d at 140, 642 N.Y.S.2d at 571.

442. *Id.*, 665 N.E.2d at 140, 642 N.Y.S.2d at 571.

443. *Id.*, 665 N.E.2d at 140, 642 N.Y.S.2d at 571.

testify and the grand jury returned an indictment.[444] At trial, the defendant moved to dismiss the indictment on the ground that the grand jury judge's decision forced him to choose between testifying at grand jury and forfeiting his Fifth Amendment privilege as to the pending perjury charge.[445]

The Court held that although a defendant who elects to testify waives his Fifth Amendment privilege and may be cross-examined regarding past acts regarding credibility, "a testifying defendant does not automatically waive the privilege . . . as to questions concerning pending criminal charges unrelated to the case" except where the defendant opens the door himself to such questioning.[446] The Court noted that although the right to testify before a grand jury is statutory, nothing in the statutory language indicates that the legislature intended the waiver to exceed the scope of the defendant's right to testify at trial.[447] Since the defendant's right to testify encompasses only those matters pertinent to the case before the grand jury, the defendant's waiver did not apply to the pending perjury charge as it was not pertinent to the larceny charge under investigation.[448]

In *People v. Seigel*, the Court of Appeals held that a trial court may interrupt testimony to warn a witness of the danger of perjury and the right to consult counsel even though the effect is to dissuade the witness from giving testimony for the accused.[449] In *Seigel*, the defendant was accused of a racially-motivated, life-threatening beating of an African-American teenager, following a confrontation between the two at a party.[450] A defense witness testified at trial that the defendant did not go to the scene of the fight with the intention of causing harm and that the victim was the aggressor in the initial confrontation at the party.[451] On cross-examination, the prosecutor was able to elicit testimony which demonstrated a variance between the direct examination and the earlier grand jury testimony by the witness.[452] At this point, the court, concerned about the risks that the witness might commit perjury, warned the witness of the consequences and asked him if he would like

444. *Id.*, 665 N.E.2d at 140, 642 N.Y.S.2d at 571.
445. *Id.*, 665 N.E.2d at 140, 642 N.Y.S.2d at 571.
446. *Id.* at 718, 665 N.E.2d at 140, 642 N.Y.S.2d at 570.
447. *See id.* at 719, 665 N.E.2d at 141, 642 N.Y.S.2d at 571.
448. *Id.*, 665 N.E.2d at 141, 642 N.Y.S.2d at 571.
449. 87 N.Y.2d 536, 543, 663 N.E.2d 872, 874, 640 N.Y.S.2d 831, 833 (1995).
450. *Id.* at 539, 663 N.E.2d at 873, 640 N.Y.S.2d at 832.
451. *Id.* at 541, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
452. *Id.*, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.

to consult with counsel.[453] The defense witness met with counsel and decided to assert his Fifth Amendment privilege against self-incrimination as to all interrogation regarding the events he testified to on direct examination.[454] The court later charged the jury that it could consider the invocation of the privilege in assessing the credibility of the witness.[455]

On appeal, the defendant argued that by warning his witness of the risks of perjury and by asking him if he would like to meet with counsel, the court intimidated the witness into invoking his Fifth Amendment privilege.[456] The defendant also argued that the court erred by instructing the jury that it could consider the invocation of the Fifth Amendment in weighing the credibility of the witness.[457]

The Court of Appeals held that the trial judge acted properly in warning the witness.[458] The Court also approved the court's instruction that the jury could consider invocation of the privilege as bearing on credibility.[459] The Court stated that "[b]y the assertion of his privilege to refuse to answer the . . . questions, [the] direct testimony was never subjected to the truth-testing process of cross-examination, and the jury was properly permitted to take this into account."[460]

The traditional rule in New York is that prior inconsistent statements of a witness are admissible only for the non-hearsay purpose of impeaching the credibility of the witness and not for the truth of the facts contained in the statement.[461] This limitation on the use of prior inconsistent statements remains well-established for criminal cases.[462] In civil cases, however, it has been said that there is a strong current trend in "support for the proposition that an inconsistent statement by a non-party witness may be received for all purposes, not merely to im-

453. *Id.*, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
454. *Id.* at 542, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
455. *Id.*, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
456. *Id.*, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
457. *Id.*, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
458. *Id.*, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
459. *Id.*, 663 N.E.2d at 874, 640 N.Y.S.2d at 833.
460. *Id.* at 545, 663 N.E.2d at 876, 640 N.Y.S.2d at 835.
461. People v. Hall, 208 A.D.2d 1044, 1046, 617 N.Y.S.2d 579, 581 (3d Dep't 1994) (prior inconsistent statements used for purposes of impeachment have no substantive or independent evidentiary value).
462. People v. Gilman, 135 A.D.2d 951, 951-52, 522 N.Y.S.2d 360, 361-62 (3d Dep't 1987) ("whatever different rule may be applicable in civil cases, the law is clear that in a criminal case a prior inconsistent statement does not constitute evidence-in-chief and may only be used for impeachment purposes").

peach the [credibility of a] witness."[463] A number of decisions by the Appellate Division, Third Department, have so held.[464] Another such decision was decided during the *Survey* period. In *Sobol v. Porte*, the issue involved prior inconsistent sworn statements made by witnesses in a prior proceeding.[465] The Third Department held that in this action for slander, the statements "could be considered as evidence-in-chief."[466] This view of the effect to be given prior inconsistent statements in civil cases is contradicted by several decisions in other departments.[467] It remains for the Court of Appeals or the Legislature to clarify this area of the law.[468]

C. The Missing Witness Charge

The uncalled witness rule provides that if a party has it peculiarly within his power to produce a witness whose testimony would elucidate a material transaction, the fact that he does not call the witness creates a permissible inference that the testimony, if produced, would be unfavorable.[469] For over a century, this common law inference has been followed in federal and most state courts.[470] It is the law in New York.[471] When it applies, this inference results in a missing witness charge instructing the jury that it can infer that the testimony of the missing person would be adverse.[472] *Leahy v. Allen* was a personal injury action in which plaintiff sought damages for serious injury.[473] At

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463. 1 N.Y. PATTERN JURY INSTRUCTIONS - CIVIL 1:66 (3d ed. 1996).

464. *See, e.g.*, *In re* Grace "VV," 206 A.D.2d 608, 609, 614 N.Y.S.2d 582, 583-84 (3d Dep't 1994); Whitman Delicatessen, Inc. v. State Liquor Auth., 83 A.D.2d 963, 443 N.Y.S.2d 14 (3d Dep't 1981) (noting that there is authority for the proposition that a prior inconsistent statement would be admissible in a civil action as evidence-in-chief); *see also* Campbell v. City of Elmira, 84 N.Y.2d 505, 644 N.E.2d 993, 620 N.Y.S.2d 302 (1994).

465. 225 A.D.2d 918, 918-19, 638 N.Y.S.2d 995, 996 (3d Dep't 1996).

466. *Id.* at 919, 638 N.Y.S.2d at 996.

467. *See, e.g.*, Noskewicz v. City of N.Y., 155 A.D.2d 646, 647, 548 N.Y.S.2d 237, 238 (2d Dep't 1989) (stating that prior inconsistent statements of the testifying witness should have been admitted "for the sole purpose of impeaching his credibility"); Egleston v. Kalamarides, 89 A.D.2d 777, 778, 453 N.Y.S.2d 489, 491 (4th Dep't 1982) (summary judgment properly granted because "prior inconsistent statements of a witness have no value as evidence in chief and standing alone are insufficient to raise a triable issue of fact").

468. For a full discussion of the conflict and uncertainty over the effect of prior inconsistent statements in civil cases, see MARTIN, *supra* note 1, § 8.3.1.1.

469. Graves v. United States, 150 U.S. 118 (1893).

470. *See id.*

471. People v. Macana, 84 N.Y.2d 173, 177, 639 N.E.2d 13, 14, 615 N.Y.S.2d 656, 657 (1994).

472. *Id.* at 177, 639 N.E.2d at 14, 615 N.Y.S.2d at 657.

473. 221 A.D.2d 88, 90, 644 N.Y.S.2d 388, 390 (3d Dep't 1996).

the defendant's request, the plaintiff was examined by a physician selected by defendant.[474] The defendant's examining doctor was not called to testify.[475] The trial court denied the plaintiff's request for a missing witness charge upon defendant's representation that the nontestifying doctor's testimony would merely be cumulative of the testimony of plaintiff's treating physician.[476] The Appellate Division, Third Department, found this to be error.[477] It held that "one person's testimony may be considered cumulative of another's only when both individuals are testifying in favor of the same party."[478] The court reasoned that if the rule were otherwise, there would never be a reason to give the missing witness charge.[479] Accordingly, the court stated that the trial court should have charged the jury that it was at liberty to infer that, if called, the defendant's physician would have confirmed that plaintiff suffered serious injury.[480]

The uncalled witness rule, as defined by New York courts, frequently includes a requirement that the witness be "under the control of the party" that fails to produce the testimony.[481] This requirement, however, is not much of a restriction in New York. For example, in *Sanders v. Otis Elevator Co.*, a products liability case, defendant's failure to call its expert witness after giving notice of his identity and proposed testimony was found to warrant a missing witness charge.[482] It is difficult to claim that an expert witness is really under anyone's control. An expert is not an employee or agent of the party calling him.

D. The Dead Man Statute

A decision of the Second Circuit Court of Appeals combines an interpretation of the New York Dead Man Statute with the definition of "unavailability" in the federal former testimony hearsay exception.[483]

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474. *Id.* at 91-92, 644 N.Y.S.2d at 391.

475. *Id.* at 92, 644 N.Y.S.2d at 391.

476. *Id.*, 644 N.Y.S.2d at 391 (citing DeFreese v. Grau, 192 A.D.2d 1019, 597 N.Y.S.2d 230 (3d Dep't 1993)).

477. *Id.* at 92, 644 N.Y.S.2d at 391.

478. *Id.*, 644 N.Y.S.2d at 391.

479. *Id.*, 644 N.Y.S.2d at 391.

480. *Id.*, 644 N.Y.S.2d at 391.

481. Jackson v. County of Sullivan, 232 A.D.2d 954, 955, 648 N.Y.S.2d 808, 809 (3d Dep't 1996).

482. 232 A.D.2d 327, 649 N.Y.S.2d 19 (1st Dep't 1996).

483. Rosenfeld v. Basquiat, 78 F.3d 84 (2d Cir. 1996); *see* N.Y. CPLR 4519 (McKinney 1992) (New York Dead Man Statute); FED. R. EVID. 804(b)(1) (defining "unavailability").

In *Rosenfeld v. Basquiat*, an art dealer sued the estate of a deceased artist, seeking damages or specific performance of an alleged contract for the sale of three paintings.[484] The plaintiff dealer testified at length in the first trial regarding contract transactions with the now deceased artist.[485] This testimony was allowed because the defendant estate waived the Dead Man Statute.[486] The first proceeding ended with a hung jury.[487] At the second trial the defendant estate did raise the Dead Man Statute and objected to the plaintiff's testimony on the ground that plaintiff was incompetent to testify about transactions with the decedent.[488] The objection was sustained, and the plaintiff's live testimony was excluded.[489] This ruling is not controversial since under Federal Rule of Evidence 601, the New York Dead Man Statute applies in federal court when, as here, it concerns "an element of a claim or defense as to which state law supplies the rule of decision."[490] Although the plaintiff was not permitted to testify live, her former testimony given in the first trial was admitted under Rule 804(b)(1) of the Federal Rules of Evidence, the former testimony exception to the rule against hearsay.[491] Rule 804(b)(1) requires that the declarant be unavailable and the district court found this requirement met by virtue of plaintiff's incompetency under the Dead Man Statute.[492] The Second Circuit reversed and held that the federal former testimony exception did not apply because incompetency is not one of the listed grounds for unavailability in Rule 804.[493] The court went on to explain that, even if the plaintiff were deemed "unavailable" under Rule 804, the plaintiff still does not prevail.[494] On the latter point, the court reasoned that even if the former testimony exception applied, it would only obviate a hearsay objection.[495] When the New York Statute, CPLR section 4519, renders a witness incompetent and her testimony inadmissible, "the fact that the testimony would fall under an exception to the hearsay rule is simply

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484. *Rosenfeld*, 78 F.3d at 86.
485. *Id.* at 86-87.
486. *Id.* at 87.
487. *Id.*
488. *Id.*
489. *Id.*
490. FED. R. EVID. 601.
491. *Rosenfeld*, 78 F.3d at 89.
492. *Id.* at 88; *see* FED. R. EVID 804(b)(1).
493. *Rosenfeld*, 78 F.3d at 89; *see* FED. R. EVID. 804(a)(1)-(5) (including exemption by virtue of a claim of privilege as a ground of unavailability).
494. *Rosenfeld*, 78 F.3d at 89.
495. *Id.*

irrelevant."[496] In summary, the court concluded that under CPLR section 4519, the plaintiff was barred from introducing her testimony, whether live or previously recorded, concerning her transaction with the deceased artist.[497]

E. Sequestration of Witnesses

In order to discourage collusion or the tailoring of testimony among witnesses, the trial judge may exclude them from the courtroom during the testimony of other witnesses.[498] In these situations the witness is said to be "sequestered" or "under the rule."[499] In New York, sequestration is within the discretion of the trial judge.[500] In federal courts it is a matter of right on request of one of the parties.[501] Even so, parties may never be excluded from the courtroom.[502] In particular, to exclude an accused in a criminal case would be a denial of defendant's constitutional rights to present a defense, to confront witnesses and to the effective assistance of counsel.[503]

In a 1997 Second Circuit decision, *Agard v. Portuondo*, the court of appeals faced the question of how to handle prosecutorial comments that called attention to the defendant's opportunity to shade his testimony by virtue of his courtroom presence during the testimony of the other witnesses.[504] In her summation, the prosecutor noted that the defendant had a benefit over all other witnesses because "he gets to sit here and listen to the testimony of all other witnesses before he testifies."[505] She continued by saying: "That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?"[506]

The Second Circuit reversed the defendant's conviction and held

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496. *Id.*

497. *Id.*; *see* Michael Martin, *The Dead Man Statute and Former Testimony*, N.Y.L.J, June 14, 1996, at 3.

498. People v. Cooke, 292 N.Y. 185, 190-91, 54 N.E.2d 357, 360 (1944).

499. MARTIN, *supra* note 1, § 6.15.; FED. R. EVID. 615; *Cooke*, 292 N.Y. at 191, 54 N.E.2d at 360.

500. *Cooke*, 292 N.Y. at 191, 54 N.E.2d at 360.

501. "At the request of a party the court *shall* order witnesses excluded so that they cannot hear the testimony of other witnesses." FED. R. EVID. 615 (emphasis added).

502. People v. Dokes, 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992).

503. *Id.* at 659-60, 595 N.E.2d at 838-39, 584 N.Y.S.2d at 763-64.

504. 117 F.3d 696, 698 (2d Cir. 1997).

505. *Id.* at 707.

506. *Id.*

that these and other comments violated numerous constitutional rights of the defendant.[507] The court stated its view that:

> [I]t is constitutional error for a prosecutor to insinuate to the jury for the first time during summation that the defendant's presence in the courtroom at trial provided him with a unique opportunity to tailor his testimony to match the evidence. Such comments violate a criminal defendant's right to confrontation, his right to testify on his own behalf, and his right to receive due process and a fair trial.[508]

CONCLUSION

We conclude by alerting the reader to two significant issues that await decision in the United States Supreme Court during 1998.

One involves a constitutional challenge to a per se rule of exclusion of polygraph evidence when it is offered by the accused. The United States Court of Appeals for the Armed Forces, relying on *Rock v. Arkansas*,[509] held that a military rule that mandates exclusion of lie detector evidence violates the defendant's Sixth Amendment right to present a defense.[510] The Supreme Court has granted certiorari and has heard argument.[511] If the Court affirms and rules that per se bans of this kind of evidence are unconstitutional, it will have an impact on state as well as federal courts.[512]

Another pending issue involves the standard for the federal appellate review of trial court decisions that exclude scientific evidence under criteria established in *Daubert v. Merrell Dow Pharmaceuticals*.[513] Although most circuits adhere to the customary "abuse of discretion" standard,[514] at least two have adopted a "hard look" standard which

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507. *Id.* at 708.

508. *Id.* at 709.

509. 483 U.S. 44, 54 (1987).

510. United States v. Scheffer, 41 M.J. 683 (U.S. Air Force Ct. of Crim. App. 1995).

511. United States v. Scheffer, 117 S. Ct. 1817 (1997).

512. As this *Survey* issue was being published, the Supreme Court decided, in *United States v. Scheffer*, that the categorical per se exclusion of polygraph evidence mandated by Military Rule of Evidence 707 did not violate the Constitution. 118 S. Ct. 1261, 1263 (1998). The Court noted that the accused's right to present evidence is subject to reasonable restrictions in order to insure reliability. *Id.* at 1264.

513. 509 U.S. 579 (1993).

514. In this camp we find the Fifth, Sixth, Ninth and Tenth Circuits. *See, e.g.*, Pedraza v. Jones, 71 F.3d 194, 197 (5th Cir. 1995); United States v. Jones, 107 F.3d 1147, 1150-55 (6th Cir. 1997); Lust v. Merrell Dow Pharm., Inc., 89 F.3d 594, 597-98 (9th Cir. 1996); Duffee v. Murray Ohio Mfg. Co., 91 F.3d 1410 (10th Cir. 1996). Similarly, some others speak of reversal only when the trial judges' determinations are "clearly erroneous" or "manifestly erroneous." *See* United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996);

provides less insulation to the trial court's decision.[515] This more stringent criteria for review is now before the Supreme Court in *Joiner v. General Electric Co.*[516] Its decision will be reported in next year's *Survey*.[517]

McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir. 1995).

515. Thus, in *Joiner v. General Electric Co.*, 78 F.3d 524 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997), the Court stated that although a district court's ruling on admissibility of evidence is normally reviewed for abuse of discretion, the situation is different for rulings on the admissibility of expert testimony." *Id.* at 529. The court also stated that "to the extent that the district court's ruling turns on an interpretation of a Federal Rule of Evidence, our review is plenary." *Id.* The stringent standard of review applied in *Joiner* is similar to the "hard look" standard adopted by the Third Circuit in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 749-50 (3d Cir. 1994). The *Paoli* "hard look" is said by the court to be appropriate when the trial judge's exercise of discretion excludes the expert testimony and the ruling results in a grant of summary judgment or a directed verdict. *Id.* at 750.

516. 117 S. Ct. 1243 (1997).

517. As this *Survey* article went to press, the United States Supreme Court rendered its decision in *General Elec. Co. v. Joiner*, 118 S. Ct. 512 (1997). It held that "abuse of discretion"—the standard ordinarily applicable to review evidentiary rulings—is the proper standard to review a district court's decision to admit or exclude expert scientific evidence. *Id.* at 515.